Supreme Court, U.S.
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No. 92-1982

In the Supreme Court of the United States

OCTOBER TERM, 1992

HILLCREST MEDICAL CENTER, PETITIONER

v.

RONDA SCRIBNER, RESPONDENT

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oklahoma

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PETITION FOR A WRIT OF CERTIORARI

W. MICHAEL HILL
EDWARD J. MAIN
Secrest & Hill
7134 South Yale, Suite 900
Tulsa, Oklahoma 74316
(918) 494-5905

REUBEN DAVIS
FREDERIC N. SCHNEIDER, III
WILLIAM C. KELLOUGH
Boone, Smith, Davis, Hurst & Dickman
500 Oneok Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000

ANDREW L. FREY *
KENNETH S. GELLER
MICHAEL A. VATIS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

Petitioner Hillcrest Medical Center, a not-for-profit community hospital, was held liable for $5 million in punitive damages based on the negligence of its employees. The employees had mistakenly moved the respondent from her room in preparation for an ultrasound actually scheduled for another patient. However, respondent was correctly identified and returned to her room before the ultrasound was performed, and she suffered no permanent impairment from the incident. In addition, there was no evidence that similar misidentification of a patient had ever occurred at Hillcrest in the past.

Nevertheless, a jury awarded respondent $100,000 in compensatory damages and $10 million in punitive damages. The punitive damages were upheld by the Oklahoma trial court after the most cursory review. The state court of appeals then affirmed the judgment on condition of remittitur of $5 million, leaving in place punitive damages of $5 million—50 times larger than the award of compensatory damages. This petition presents two questions:

1. Whether the $5 million punitive damages exaction in this case violates substantive due process because it exceeds any amount that is rationally related to the purposes of punishment and deterrence.

2. Whether the punitive damages determination in this case lacked the procedural safeguards necessary to protect petitioner from a deprivation of its property without due process of law.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Hillcrest Medical Center states that it is incorporated as a not-for-profit organization under Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). Hillcrest Medical Center's parent corporation is Hillcrest HealthCare Corporation, which also is a not-for-profit organization under Section 501(c)(3). Hillcrest HealthCare Corporation is also the parent corporation of Hillcrest Medical Center Foundation and several other organizations, including for-profit companies. Hillcrest Medical Center has no subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
A. The Events Giving Rise to Scribner's Claim	3
B. Trial Proceedings	5
C. Review by the Trial Court	9
D. Review by the Court of Appeals	10
REASONS FOR GRANTING THE PETITION	11
I. THE $5 MILLION PUNITIVE DAMAGES AWARD IS SO GROSSLY EXCESSIVE AS TO VIOLATE DUE PROCESS	14
II. THE AWARD VIOLATES PROCEDURAL DUE PROCESS	17
A. The Jury Instructions Failed to Give the Jury Adequate Guidance	18
B. Both the Trial Court and Court of Appeals Failed to Conduct Meaningful Review of the Jury's Award	21
CONCLUSION	27

TABLE OF CONTENTS—Continued

APPENDIX A — Page

Decision of the Oklahoma Court of Appeals 1a

APPENDIX B

Decision of the District Court of Tulsa County..... 21a

APPENDIX C

Order of the Oklahoma Court of Appeals Denying Rehearing 24a

APPENDIX D

Order of the Oklahoma Supreme Court Denying Certiorari 25a

TABLE OF AUTHORITIES

Cases	Page
Alexander & Alexander, Inc. v. *B. Dixon Evander & Assocs., Inc.*, 596 A.2d 687 (Md. Ct. Spec. App. 1991)	13
Bankers Life & Casualty Co. v. *Crenshaw*, 486 U.S. 71 (1988)	22
Browning-Ferris Indus. v. *Kelco Disposal, Inc.*, 492 U.S. 257 (1989)	14, 22
Buzzard v. *Farmers Ins. Co., Inc.*, 824 P.2d 1105 (Okla. 1991)	24-25
Canton v. *Harris*, 489 U.S. 378 (1989)	16
Chandler v. *Denton*, 741 P.2d 855 (Okla. 1987)	23-25
City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)	20
General Motors Corp. v. *Johnston*, 592 So. 2d 1054 (Ala. 1992)	13
In re Paris Air Crash, 622 F.2d 1315 (9th Cir.), cert. denied sub nom. *Kalinsky* v. *General Dynamics Corp.*, 449 U.S. 976 (1980)	20
Mattison v. *Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991)	13, 23
Mitchell v. *Ford Motor Credit Co.*, 688 P.2d 42 (Okla. 1984)	25
OKI Am., Inc. v. *Microtech Int'l, Inc.*, 872 F.2d 312 (9th Cir. 1989)	21
Pacific Mutual Life Ins. Co. v. *Haslip*, 111 S. Ct. 1032 (1991)	*passim*
Slocum v. *Phillips Petroleum Co.*, 769 P.2d 146 (Okla. 1989)	10
Timmons v. *Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982)	23-25
TXO Prod. Corp. v. *Alliance Resources Corp.*, No. 92-479 (argued March 31, 1993)	*passim*
United Mine Workers v. *Bagwell*, No. 92-1625 (cert. granted, June 1, 1993)	13
Wolf v. *Goodyear Tire & Rubber Co.*, 808 S.W.2d 868 (Mo. Ct. App. 1991)	13
Zazu Designs v. *L'Oreal, S.A.*, 979 F.2d 499 (7th Cir. 1992)	21

TABLE OF AUTHORITIES—Continued

Constitutions and Statutes	Page
26 U.S.C. § 501(c)(3)	ii
28 U.S.C. § 1257(a)	1
Okla. Stat. tit. 21, § 644 (Supp. 1993)	16
Okla. Stat. tit. 23, § 9(A) (1987)	2, 6-7, 10
U.S. CONST. amend. XIV	2

Miscellaneous

DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT OF THE TASK FORCE ON MEDICAL LIABILITY AND MALPRACTICE (1987)	15
Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982)	20
II AMERICAN LAW INSTITUTE, REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE (1991)	20-21
Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931)	20

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PETITION FOR A WRIT OF CERTIORARI

Hillcrest Medical Center respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of Oklahoma in this case.

OPINIONS BELOW

The opinions of the Court of Appeals of the State of Oklahoma (App., *infra*, 1a-20a) and the District Court of Tulsa County (App., *infra*, 21a-23a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 1992. Hillcrest's petition for rehearing was denied on November 6, 1992. The Supreme Court of Oklahoma denied Hillcrest's petition for a writ of certiorari on March 17, 1993. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall * * * deprive any person of * * * property without due process of law * * *.

U.S. CONST. amend. XIV.

Oklahoma's punitive damages statute provides, in pertinent part:

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of actual damages awarded. Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing the defendant, and the percentage limitation on such damages set forth in this section shall not apply.

Okla. Stat. tit. 23, § 9(A) (1987).

STATEMENT

This case involves the imposition of $5 million in punitive damages against petitioner Hillcrest Medical Center, a not-for-profit community hospital, in a medical malpractice action. The day after undergoing a hysterectomy at Hillcrest, respondent Ronda Scribner was mis-

takenly moved from her room to an ultrasound laboratory for testing that was scheduled for another patient. Although Scribner was correctly identified before the ultrasound procedure began and was returned to her room, she alleged that the movement caused an incisional dehiscence (or opening) of sutures that she had received during the hysterectomy. Additional surgery was required to repair the dehiscence.

Scribner suffered no permanent impairment from being mistakenly moved for the ultrasound procedure or from the subsequent surgery. Nevertheless, a jury awarded her $100,000 in compensatory damages—at most $2716 for out-of-pocket expenses and the rest for pain and suffering—and imposed $10 million in punitive damages. Upon review by the court of appeals, the punitive damages were reduced to $5 million. Even after that reduction, however, the $5 million punishment is 50 times greater than the award of compensatory damages and at least 1840 times greater than Scribner's out-of-pocket expenses.

A. The Events Giving Rise to Scribner's Claim

On October 1, 1985, Ronda Scribner underwent a routine and successful hysterectomy at Hillcrest Medical Center. App., *infra*, 3a. Dr. Linda Reza performed the operation. *Ibid.*; Reza Dep. 8.[1] After the surgery, Scribner was placed in Bed B of a semi-private room to recover. App., *infra*, 3a. In the early morning hours of October 2, the patient occupying Bed A in Scribner's room was moved to a different room, but the move was not recorded in the hospital's records. *Ibid.*

Later that morning, an orderly came to Scribner's room seeking the patient who had been in Bed A. App., *infra*, 3a. Thinking that Scribner was that patient, the orderly informed her that he was there to take her to the ultra-

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[1] Dr. Reza's deposition was read into the record at Tr. 551.

sound laboratory for testing. *Id.* at 3a-4a. Scribner told the orderly that she had recently had surgery and was not aware that any ultrasound had been ordered. *Id.* at 4a; Tr. 129-131. Nevertheless, without checking Scribner's identity, the orderly helped Scribner out of bed and into a wheelchair. App., *infra*, 4a; Tr. 132, 143. Scribner testified that this movement caused her to experience severe pain. App., *infra*, 4a; Tr. 500. The orderly then took Scribner to the ultrasound laboratory. App., *infra*, 4a.

When Scribner arrived at the ultrasound laboratory, the ultrasound technologist saw that she had an IV and a catheter, which the correct patient was also supposed to have. Tr. 188-89. The technologist then began to prepare Scribner for the ultrasound by passing water through a catheter into her bladder, causing her to experience cramp-like pain. App., *infra*, 4a. As soon as the technologist noticed Scribner's surgical scar from the hysterectomy, however, she immediately called the nursing station to confirm the procedure. Tr. 193-94. When the technologist used the name of the correct patient in that call, Scribner said, "That's not me." Tr. 194. Realizing then that a mistake had been made, the technologist immediately drained the water from Scribner's bladder, notified her supervisor about the situation, and brought Scribner back to her room without ever performing the ultrasound. App., *infra*, 4a; Tr. 197-98, 266.

Scribner was discharged from the hospital five days later, on October 7, 1985. App., *infra*, 4a; Tr. 515. On October 9, however, she was readmitted to Hillcrest on account of abdominal pain caused by an incisional dehiscence and hernia; a dehiscence (or opening) had occurred in the internal incision from the hysterectomy and a portion of the intestine had protruded through the opening, causing a pouching in the abdomen. App., *infra*, 4a. The dehiscence was surgically repaired by Dr. Reza on October 10 without complication. *Ibid.*; Reza Dep. 11,

34-38; Pltff's Ex. 1 (Operative Report for 10/10/85). Scribner sustained no permanent impairment from the dehiscence or its surgical repair. App., *infra*, 4a; Reza Dep. 80-81.[2]

B. Trial Proceedings

On February 24, 1986, Scribner filed this action against Hillcrest for negligence and assault and battery.[3] Scribner sought actual damages of $307,043. Trial Court's Statement of the Case at 2. No more than $2716 of the actual damages were for out-of-pocket expenses consisting of the cost of the second surgery ($2093) and lost wages ($623); the remainder was for pain and suffering. Tr. 694-98. In addition, Scribner sought punitive damages of up to nearly $108 million—the net worth of the hospital. Trial Court's Statement of the Case at 2.[4]

Hillcrest did not dispute that its employees had been negligent in failing properly to identify Scribner before moving her from her bed and preparing her for an ultrasound. See Trial Court's Statement of the Case at 2. The main issues at trial were whether the movement of Scribner actually caused the dehiscence and whether the negligence amounted to "reckless or wanton disregard" of Scribner's rights so as to permit punitive damages under Oklahoma law. *Ibid.*

The parties' witnesses sharply disagreed on the cause of the dehiscence and incisional hernia. Scribner's ex-

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[2] Scribner's only physical complaint was that when she stretched or was tense, she could feel a small ridge or knot where the permanent sutures were put in to repair the dehiscence. Tr. 508.

[3] Scribner originally sued Dr. Reza as well but voluntarily dismissed her as a defendant. Dismissal Without Prejudice (Nov. 7, 1988).

[4] In his closing argument, however, Scribner's counsel requested that the jury award "eight to ten million dollars" because "if you give $107,000,000 we're going to be back in this courthouse trying this lawsuit again in a couple of years." Tr. 691-92.

perts testified that the dehiscence was caused by straining and pulling that occurred when the orderly assisted Scribner from her bed into the wheelchair. Tr. 315, 361.

Hillcrest's expert, on the other hand, testified that Scribner's movement the day after the hysterectomy could not have caused the dehiscence because it did not exert sufficient force on the incision to affect the suture. Tr. 593. He believed that the dehiscence probably occurred because the suture material had been weakened during the cauterization of the incision at the conclusion of the hysterectomy. Tr. 577-79, 592.

Dr. Reza—who performed both the hysterectomy and the subsequent surgery to repair the dehiscence—also testified that moving Scribner for the ultrasound did not cause the dehiscence. App., *infra*, 5a; Reza Dep. 13. Dr. Reza had instructed that Scribner be ambulatory on the day after the hysterectomy and determined that Scribner's actual movement during the incident did not differ in any way from the type of movement she had directed. *Id.* at 14-15. Dr. Reza concluded that the dehiscence was caused by an abdominal distention resulting from a bowel complication that occurred during Scribner's initial hospitalization. App., *infra*, 5a; Reza Dep. 16, 20.[5]

Before closing arguments, the trial court decided, over Hillcrest's objection (Tr. 673-75), that there was sufficient evidence to lift Oklahoma's statutory cap on punitive damages, which limits punitive damages to the amount of compensatory damages. Okla. Stat. tit. 23, § 9(A) (1987). The Oklahoma punitive damages statute provides that the cap may be lifted if the trial court finds that there is "clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reck-

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[5] Hillcrest's witnesses also testified, without contradiction, that filling Scribner's bladder with sterile water did not cause the dehiscence. Tr. 593-94; Reza Dep. 13-14.

less disregard for the rights of another * * *." *Ibid.*[6] The court found that "the evidence is clear and convincing * * * that there was a lackadaisical attitude towards handling the check procedures for the purpose of identifying a patient" (Tr. 603), even though there was no evidence of any previous misidentification by a Hillcrest employee. On the urging of plaintiff's counsel, the court sought to fit its finding to the statutory requirement by stating that "the lackadaisical attitude would create a reckless and wanton disregard for the rights of the patient." Tr. 605.

In submitting the issue of punitive damages to the jury, the trial court gave the following instruction, which closely followed Oklahoma Uniform Jury Instruction 5.5:

> If you find in favor of the Plaintiff Ronda Scribner and grant her actual damages, and if you find the conduct of the Defendant amounted to a wanton or reckless disregard for the rights of another, then you may, in addition to actual damages, grant exemplary damages in such sum as you reasonably believe will punish and be an example to others.
>
> Exemplary damages are not to be construed as compensation to the Plaintiffs, but as punishment to the Defendants, and as an example to others to deter them from like conduct.

Instruction 22; Tr. 683.[7]

In his closing argument, Scribner's counsel focused almost entirely on punitive damages. He told the jury that

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[6] Oddly, though, once the cap is lifted, the jury is *not* required to find "clear and convincing evidence" of the requisite conduct to impose punitive damages; it applies only a preponderance-of-the-evidence standard. See page 7, *infra*.

[7] The court overruled Hillcrest's objection to this instruction and refused to give Hillcrest's requested instructions on punitive damages, which would have clarified the type of conduct that may give rise to such damages. Tr. 680. See Defendant's Requested Jury Instructions.

it had "unlimited power" to award punitive damages up to $108 million—the net worth of the hospital. Tr. 685-86. Counsel repeatedly argued that a large award was necessary to "send * * * a message" to Hillcrest, which he characterized as a wealthy, uncaring institution:

> Let me tell you something about punitive damages. A rich man won't pay his fines. * * * He'll accumulate his parking fines and violations and once every six months he'll send a hired girl or somebody on the payroll down to pay it. He doesn't go down there. * * * He's not intimidated by these small fines and parking fines, not the rich man, he's not. But we are. We have to pay our fines. * * * If you're going to make a rich man hear you you've got to to [sic] enough in money damages toward him that he hears you irrevocably. * * *
>
> After this trial is over one of two things is going to happen out there in that hospital board room. They're going to have a meeting, board meeting * * * and they're either going to pop open a bottle of champagne or whatever they drink out there and they're going to say boy, this is dandy, we won this one and this is the way to do it. Let's keep it up, boys. We're making money hand over fist. We're bringing in $160,000,000 a year. Let's keep it up. And then you will have said keep it up. We're for you.
>
> Or they are going to stand up and they're going to say listen, we can't do it this way anymore. * * * It just got too high priced.

Tr. 685, 691.

Indeed, counsel even suggested that the absence of Hillcrest's administrators from the trial showed that the hospital held the jurors in disdain and thought nothing of the case:

> I haven't seen the CEO of Hillcrest here, Chief Executive Officer. I haven't seen any members of the Board of Directors. I see a lady over there that's

> a hired hand that they sent down here to take their whipping for them. They're not here. * * * Do you know why they're not here? Because this isn't important to them. * * * They don't think that you citizens off the public street have enough gumption, enough common sense, enough character and enough guts to do something to get their attention.
>
> Well, if you want to talk to the Board of Hillcrest up there and you want to send them a message they'll hear, then you have to find substantial damages in punitive damages in this case. * * * We're not animals in a veterinary clinic, we're people. * * *
>
> These people drag in a $160,000,000 a year and they don't love us. * * * What is the matter with these people? And they are so oblivious out there to you they don't fear you, they don't respect you, they're not even here.

Tr. 685-86, 690-91.

The jury returned a general verdict for Scribner, awarding her $100,000 in actual damages and $10 million in punitive damages. App., *infra*, 5a; Tr. 711-12.

C. Review by the Trial Court

Hillcrest then filed a motion to vacate the punitive damages award, arguing, *inter alia*, that the award violated both procedural and substantive due process.[8] Without holding a hearing, the trial court denied the motion. The court first held that the jury was given sufficient guidance in determining *whether* to award punitive dam-

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[8] See, *e.g.*, Brief in Support of Term Time Motion to Vacate Award of Punitive Damages 4 ("the absence of any meaningful standards or limitations on the unbridled exercise of jury discretion is so lacking in any fundamental fairness as to impose a 'highly penal' sanction upon this defendant without due process of law"); *id.* at 5 ("Based upon these constitutional principles [in the Fifth and Fourteenth Amendments] * * * [t]he award is clearly excessive by any measure. The $10,000,000.00 figure is one hundred times as large as the award of actual damages.").

ages because "[c]onduct necessary for the award is set forth with sufficient precision [in the punitive damages statute] for the jury to make this determination. See 23 O.S. Section 9, 1986; Slocum versus Phillips Petroleum Co., 769 P.2d 146, Okl. 1989, at Page 149 under the syllabus 2 notation." App., *infra*, 21a-22a. The court did not address, however, whether the instruction that was actually given to the jury provided sufficient guidance as to the meaning of the concept "wanton or reckless disregard for the rights of another," the statutory prerequisite to punishment.

The court then held that the jury's discretion regarding the *amount* of punitive damages was sufficiently constrained by the statutory requirement that it award damages "for the sake of example to others and by way of punishing the Defendant." App., *infra*, 22a. Finally, although Hillcrest had raised the issue (see note 8, *supra*), the court did not examine whether the jury's award was so excessive as to violate substantive due process.

D. Review by the Court of Appeals

The Oklahoma Court of Appeals affirmed the judgment on the condition of remittitur of $5 million of the punitive damages award. App., *infra*, 20a. The court rejected Hillcrest's procedural due process arguments, holding that the jury instruction and judicial review of whether the jury's award was " 'grossly excessive' " or " 'influenced by passion, prejudice or sympathy' " provided sufficient procedural safeguards. *Id.* at 10a-14a; see pages 24-26, *infra*. The court did not address Hillcrest's substantive due process arguments.[9] It simply concluded

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[9] Hillcrest had asserted those arguments twice. See Brief in Chief of Appellant Hillcrest Medical Center (No. 75,446) 20, 23 ("The Due Process Clause forbids damages awards that are 'grossly excessive' * * * or 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.' * * * The amount of the punitive damage award, $10,000,000, is

that the $10 million award "is 'larger than reason dictates to be necessary to deter such conduct,' is 'not properly . . . responsive to the legitimate objective of a punitive damage award,' and is 'so . . . excessive that we cannot in reason allow it to stand.' " App., *infra*, 20a (footnotes omitted). The court therefore directed remittitur of $5 million. *Ibid.* The court did not explain, however, how it had chosen the $5 million figure or why a $5 million punishment would not also be excessive.

REASONS FOR GRANTING THE PETITION

It is hard to imagine a case that better illustrates the phenomenon of punitive damages "run wild." *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991). The "lackadaisical" conduct of Hillcrest's employees here was hardly the sort of intentional, malicious conduct for which punishment is normally appropriate; it was at most reckless.[10] Moreover, Hillcrest itself was at most negligent; there was *no* evidence that a similar incident had ever occurred at the hospital before or that Hillcrest had any reason to think that its employees were not following the hospital's patient identification procedures. And certainly Hillcrest did not stand to profit from the negligence of its employees.

In addition, respondent did not suffer any lasting physical impairment, and incurred out-of-pocket losses of only

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outrageous and wholly disproportionate to any harm done to the plaintiff or any wrong committed by the defendant.") (citations omitted); Brief in Chief of Appellant Hillcrest Medical Center (No. 76,604) 5-6 ("In the instant case, Oklahoma law does not provide the procedural and substantive protections against excessive and irrational punitive awards deemed essential to due process in *Haslip*. * * * The award * * * clearly crossed th[e] line and penetrated deep into unconstitutional territory.").

[10] Nor did the conduct create a significant probability of harm. An ultrasound is a noninvasive examination procedure that is unlikely to cause injury. The conduct here was hardly at the same level as taking the wrong patient for surgery.

$2716. And the jury's award of $100,000 in compensatory damages amply compensated respondent for pain and suffering she claimed to have endured from the incident.

Despite all this, Hillcrest has been subjected to $5 million in punitive damages—an amount *50* times greater than compensatory damages, and *1840* times greater than respondent's out-of-pocket losses. The gross excessiveness of this punitive exaction runs afoul of substantive due process. Moreover, the utter lack of any meaningful constraint on the jury's discretion over punitive damages—either in the form of adequate guidance in the jury instructions or meaningful trial or appellate court review of the punishment—violates procedural due process.

Two terms ago, in *Pacific Mutual Life Insurance Co.* v. *Haslip, supra,* this Court began the process of defining the substantive and procedural limits that the Due Process Clause places on the imposition of punitive damages. Although the Court upheld the punishment in that case, it noted that the amount of the punitive damages—which was "more than 4 times the amount of compensatory damages, [wa]s more than 200 times the out-of-pocket expenses of [the plaintiff], and, of course, [wa]s much in excess of the fine that could be imposed" for the defendant's conduct—was "close to the line" of "constitutional impropriety." 111 S. Ct. at 1046.

Moreover, in determining that the award in *Haslip* comported with the *procedural* requirements of due process, the Court relied on the three tiers of procedural protections afforded to the defendant in that case: adequate jury instructions and the exclusion of evidence of the defendant's wealth to constrain the jury's initial determination, and *meaningful* trial-court and appellate review of the jury's award. 111 S. Ct. at 1044-46.

Although *Haslip* established that the imposition of punitive damages must be accompanied by reasonable

procedural protections and will violate substantive due process requirements if the amount is excessive in light of the purposes for which punishment is being imposed, it left considerable doubt as to the precise contours of these constitutional protections. Disagreements among the lower courts quickly developed,[11] leading to this Term's grant of certiorari in *TXO Production Corp.* v. *Alliance Resources Corp.*, No. 92-479 (argued March 31, 1993), to address both the procedural and substantive due process issues. This petition should be disposed of as appropriate in light of the decision in *TXO*.[12] In the event there remains a need, after *TXO*, for further elucidation of the constitutional issues associated with punitive dam-

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[11] Regarding substantive due process, compare, *e.g.*, *Alexander & Alexander, Inc.* v. *B. Dixon Evander & Assocs., Inc.*, 596 A.2d 687, 711 (Md. Ct. Spec. App. 1991) (stating that if punitive damages 4 times larger than compensatory damages were " 'close to the line' " in *Haslip*, punitive damages nearly 50 times larger than compensatory damages "surely cross[] that line") with *General Motors Corp.* v. *Johnston*, 592 So. 2d 1054, 1063-64 (Ala. 1992) (holding that "punitive damages need bear no relationship to actual damages," and permitting punitive damages 100 times larger than compensatory damages). Regarding procedural due process, compare, *e.g.*, *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 105-06 (4th Cir. 1991) (instruction to jury that it should award punitive damages "in such 'sum as you believe' will punish and deter" and judicial review solely for "excessiveness," without standards for determining excessiveness, did not satisfy due process under *Haslip*) with *Wolf* v. *Goodyear Tire & Rubber Co.*, 808 S.W.2d 868, 874 (Mo. Ct. App. 1991) (holding that nearly identical instruction and similar standardless review for excessiveness satisfied due process under *Haslip*).

[12] This Court recently granted certiorari in *United Mine Workers* v. *Bagwell*, No. 92-1625 (cert. granted, June 1, 1993), to consider a related issue: "Whether the non-compensatory civil contempt fines of $52 million * * * —analogous to the punitive damages at issue in *TXO* * * * —were so excessive as to violate the Due Process Clause * * *." If the Court does not decide the substantive due process issue in *TXO* and chooses not to hear this case on the merits, this case should be held for consideration in light of the Court's decision in *Bagwell*.

ages, this case affords an excellent vehicle for that undertaking.

I. THE $5 MILLION PUNITIVE DAMAGES AWARD IS SO GROSSLY EXCESSIVE AS TO VIOLATE DUE PROCESS

This Court made clear in *Haslip* that the Due Process Clause places an outer limit on the size of a punitive damages award, although it did not make a clear delineation of that limit. See 111 S. Ct. at 1046 (holding that punitive damages 4 times greater than compensatory damages and 200 times greater than out-of-pocket expenses, though "close to the line, * * * do[] not cross the line into the area of constitutional impropriety"). This ruling was presaged by *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276-77 (1989), which noted the existence of "authority in [the Court's] opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme," but declined to address the question whether due process limits a jury's discretion to impose punitive damages because that issue was not raised below. See also *id.* at 280 (Brennan, J., concurring) (joining Court's opinion "on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties"); accord, *id.* at 283 (O'Connor, J., concurring in part and dissenting in part).

Unless the Court reverses field entirely in *TXO* and rejects the existence of *any* substantive limit on the amount of punishment that may constitutionally be exacted, the decision below should not be permitted to stand. If the Court accepts TXO's substantive excessiveness claim, the invalidity of the punishment in this case follows *a fortiori*, and the case should be remanded for reconsideration. If, on the other hand, the Court finds

the *TXO* award not constitutionally excessive, we show below that this case is distinguishable in a way that makes it a likely candidate for review on the merits.

In *TXO*, the plaintiffs/respondents did not contest the existence of a substantive limit on the amount of punishment but defended the amount in that case largely on the basis of the ratio between the punitive damages and the potential gain to the defendant from its wrongful conduct. See, *e.g.*, Brief of Respondents at 22-24; Oral Argument Tr. 28-38. The respondents argued that even though the ratio of punitive to compensatory damages was quite large, the punitive damages were not unconstitutionally excessive because they were only 1.2 (or at most 2) times greater than the potential gain to the defendant. Brief of Respondents at 19-20, 22-24; Oral Argument Tr. 28, 31-32.

Here, in contrast, neither Hillcrest—a not-for-profit community hospital—nor its employees stood to profit to any material extent from the employees' negligence. Moreover, any savings that the hospital might have achieved through diminished oversight of employees would be more than offset by expected compensatory damages liability resulting from improper treatment due to misidentification.[13] Thus, the substantive due process

[13] Moreover, the substantial compensatory damages in this case—almost all of which were for pain and suffering—greatly exceed any conceivable "gain" to the hospital from diminished oversight. Those damages therefore were more than sufficient to induce the hospital to take corrective measures. The punitive exaction, on the other hand, will result in over-deterrence, exerting enormous pressure on the hospital to increase monitoring of low-level employees and institute other costly "defensive" measures far beyond any rational level. The cost of such "defensive medicine" inevitably will be reflected either in higher medical bills for consumers or in the curtailment of patient services. See DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT OF THE TASK FORCE ON MEDICAL LIABILITY AND MALPRACTICE 97 (1987) (estimating annual cost of defensive medicine resulting from malpractice suits at $10.6 billion). Given the current crisis in health care costs, the effects of a judgment like this are especially unfortunate.

issue here is not clouded by the "potential gain" factor. This case therefore clearly presents the question whether a punitive damages exaction 50 times greater than the award of compensatory damages, more than 1840 times greater than out-of-pocket expenses, and far, far greater than any fine that might be imposed for similar conduct under the most relevant statutory provisions,[14] violates substantive due proces. Cf. *Haslip*, 111 S. Ct. at 1046.

Furthermore, in contrast to the intentional and malicious oppression allegedly undertaken by the petitioner in *TXO*—which was "part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power," 419 S.E.2d 870, 881 (W. Va. 1992) —the conduct of Hillcrest's employees here *at most* amounted to recklessness, while Hillcrest itself was at most negligent. See App., *infra*, 6a-8a.[15] Thus, in addi-

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[14] We are unaware of any criminal penalties in Oklahoma for medical malpractice. Even the legislatively prescribed penalties for assault and assault-and-battery are minuscule compared to the punitive damages award here: $500 (and/or up to 30 days in jail) for assault; $500 (and or up to 90 days in jail) for assault-and-battery. See Okla. Stat. tit. 21, § 644 (Supp. 1993).

[15] Because Hillcrest was found liable for the actions of its employees on the theory of *respondeat superior*, the court of appeals attributed the employees' alleged recklessness to the hospital. Hillcrest itself, however, was *at most* negligent, because there was no evidence that it knew of, but was indifferent to, its employees' failure to follow the hospital's patient identification procedures, or that any similar misidentification had occurred in the past. Compare *Haslip*, 111 S. Ct. at 1041 (petitioner "had received notice that its agent * * * was engaged in a pattern of fraud identical to those perpetrated against respondents"). Thus, even if the Constitution does not prohibit the imposition of vicarious liability for punitive damages, Hillcrest's lack of knowledge of its employees' failure to follow its identification procedures highlights the unsuitability of the severe punishment in this case. Cf. *Canton* v. *Harris*, 489 U.S. 378, 385-92 (1989) (city may not be held vicariously liable under Section 1983 for failure of its employees to provide necessary medical attention to person in custody, but may be held liable only if it

tion to the high ratio of punitive to compensatory damages, this is a case in which the enormous punitive exaction is out of all proportion to the relatively low degree of "reprehensibility" involved. Cf. *Haslip*, 111 S. Ct. at 1045 (approving Alabama courts' consideration of "the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct").

II. THE AWARD VIOLATES PROCEDURAL DUE PROCESS

Haslip made clear that due process requires States to provide procedural protections that establish a "sufficiently definite and meaningful constraint on the discretion of * * * fact finders in awarding punitive damages." 111 S. Ct. at 1045. In that case, the Court held that Alabama's three tiers of procedural protections satisfied due process. Those protections consisted of: (1) adequate guidance to the jury and exclusion of evidence of the defendant's net worth; (2) meaningful and structured review by the trial court; and (3) meaningful and structured review by the state supreme court. *Id.* at 1043-46.

In this case, however, the discretion of the jury—as well as of the reviewing courts—was virtually unlimited. Cf. *Haslip*, 111 S. Ct. at 1043 ("unlimited jury discretion —or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities"). Oklahoma simply has failed to establish any meaningful system to constrain the decisions of its juries or its courts. Depending on the outcome of *TXO*, then, this Court either should grant, vacate, and remand this case for reconsideration or it should grant the petition and decide the procedural due process issue on the merits.

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had deliberate policy or custom of failing to train its employees and that policy or custom caused the injury).

A. The Jury Instructions Failed to Give the Jury Adequate Guidance

In *Haslip*, the Court "carefully reviewed" the jury instructions and held that, although somewhat sparse, the instructions managed to cross the constitutional threshold —at least when considered in light of the regime of meaningful and structured post-verdict judicial review (see pages 22-23, *infra*).[16] The *Haslip* instructions "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing * * *, and explained that their imposition was not compulsory." 111 S. Ct. at 1044.

The Court also stressed that "[a]ny evidence of [the defendant's] wealth was excluded from the trial." 111 S. Ct. at 1044. The jury therefore was "guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 1045. Thus, although the jury was given "significant discretion," that discretion was "exercised within reasonable constraints" and was not affected by inappropriate information. *Id.* at 1044.

Here, however, the jury's discretion was not similarly constrained as to the questions *whether* to impose punitive damages or *how much* to award. First, the trial court simply told the jury that it could impose punitive damages "if you find the conduct of the Defendant amounted to a wanton or reckless disregard for the rights of another." But, despite Hillcrest's request for additional explanatory instructions (see note 7, *supra*), the court provided no definition of "wanton or reckless disregard." [17]

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[16] We believe that in the absence of this regime of judicial review, the instructions in *Haslip* would have been held constitutionally inadequate. As discussed below (at pages 23-26), Oklahoma lacks such a regime.

[17] Moreover, in contrast to the *Haslip* instruction's repeated emphasis on the non-compulsory nature of punitive damages, see 111

Second, the trial court gave the jury virtually *no* guidance as to how it should determine the amount of punitive damages. It simply stated that the jury should impose whatever sum it "reasonably believe[d] will punish and be an example to others." In *Haslip*, by contrast, the jury was at least instructed to "take into consideration the character and the degree of the wrong and the necessity of preventing similar wrong" in fixing the amount. 111 S. Ct. at 1037 n.1. The jury received no such guidance in this case. This was potentially quite significant given the extraordinarily mild degree of any punishable conduct that could have been found to have occurred in this case. Nor was the jury even told that it should not impose *more* than was necessary to punish and set an example. The jury therefore could just have easily decided to impose $100 million in punitive damages as $10 million—because obviously a $100 million exaction would "punish" and "be an example to others." It apparently chose $10 million only because that is what Scribner's counsel requested in his closing argument. See note 4, *supra*.

The utter lack of adequate jury instructions was sorely exacerbated by the admission of evidence of Hillcrest's net worth. Tr. 635, 648. In the absence of meaningful guidance from the trial court, the jury naturally was left with Hillcrest's net worth as the *sole* determinant of the severity of the punishment. Not surprisingly, then, Hillcrest's net worth became the focus of plaintiff's closing argument, which repeatedly stressed that the jury had "unlimited power" to impose punitive damages up to $108 million—the hospital's net worth—and contended that a large award was necessary to "intimidate[]" the supposedly "rich" non-profit hospital. Tr. 684-85, 690-91. This

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S. Ct. at 1037 n.1, the court here simply told the jury that it "may" impose punishment upon making the requisite statutory finding. In light of the plaintiff's almost exclusive focus on punitive damages during closing argument, the jury could easily have believed that it was *expected* to impose punitive damages.

argument was bolstered by the trial court's instruction that the plaintiff was seeking punitive damages up to the hospital's net worth. Trial Court's Statement of the Case at 2.

The blatant appeal to the jury to penalize Hillcrest on the basis of its net worth was inherently prejudicial. As this Court stated in holding that municipalities are immune from punitive damages under § 1983: "evidence of a tortfeasor's wealth * * * may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981).[18] Indeed, where, as here, the defendant is a large corporation or other institutional entity, evidence of the defendant's "wealth" bears no relation whatsoever to the goals of retribution or deterrence. As stated by a group of prominent legal scholars serving as reporters for the ALI's study of possible revisions of the Restatement of Torts:

> In determining the size of the award that is sufficient for [deterrence], what is relevant is not the defendant's *overall* wealth, but rather the profit it realized from the particular tortious activity * * *.
>
> Use of evidence of the defendant's wealth in calculating punitive damages against organizational defendants therefore cannot be justified even by the rationale of economic deterrence, let alone of retributive punishment.

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[18] See also *In re Paris Air Crash*, 622 F.2d 1315, 1323 (9th Cir.) (Kennedy, J.) (noting "the temptation for a jury to award punitive damages [against a wealthy defendant] even when concrete elements of * * * intentional wrongdoing are absent"), cert. denied sub nom. *Kalinsky* v. *General Dynamics Corp.*, 449 U.S. 976 (1980); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1191 (1931) (evidence of defendant's wealth "may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function"). Accord, Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 61 (1982).

II AMERICAN LAW INSTITUTE, REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 254-55 (1991). See also *Zazu Designs* v. *L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992).

The evidence of net worth in this case was also inherently misleading. The net worth of a hospital consists largely of its building and equipment—things like CAT scanners, X-ray machines, laboratories, operating rooms, beds, etc. Tr. 652. These are, of course, illiquid assets that are part and parcel of the hospital's vital operations and are not readily available to pay a monetary judgment.

The evidence of net worth, then, combined with the plaintiff's repeated emphasis on the need to "intimidate[]" the supposedly "rich" hospital by means of an enormous punishment and the lack of any guidance from the trial court on fixing the amount of punitive damages beyond the instruction to impose "such sum as you reasonably believe will punish and be an example to others," virtually guaranteed that the amount of punitive damages was based on nothing more than Hillcrest's net worth. Cf. *Haslip*, 111 S. Ct. at 1045 ("the factfinder must be guided by more than the defendant's net worth"); *id.* at 1066 (O'Connor, J., dissenting) (noting that the amounts of punitive damages awards " 'seem to be limited only by the ability of lawyers to string zeros together in drafting a complaint.' ") (quoting *OKI Am., Inc.* v. *Microtech Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring)). The instructions in this case therefore failed to provide sufficient constraints on the jury's discretion.

B. Both the Trial Court and Court of Appeals Failed to Conduct Meaningful Review of the Jury's Award

The constitutional inadequacy of the jury instructions was compounded by the lack of meaningful, structured review by either the trial court or the court of appeals.

The absence of meaningful judicial review to check the jury's discretion rendered the imposition of punitive damages in this case violative of procedural due process.

Critical to this Court's decision upholding the award of punitive damages in *Haslip* was Alabama's provision of two tiers of judicial scrutiny of the jury's award "to make[] certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 111 S. Ct. at 1045. Under the Alabama procedure, both the trial and appellate courts examine seven "detailed substantive standards" to determine "whether a punitive award is reasonably related to the goals of deterrence and retribution." *Ibid.* Those standards are:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Ibid. This Court noted that the application of these standards "distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in *Browning-Ferris Industries* * * * and in *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71 * * * (1988)," in which "an amount awarded would be set aside or modified only if it was 'manifestly

and grossly excessive' * * *, or would be considered excessive when 'it evinces passion, bias, and prejudice on the part of the jury so as to shock the conscience.' " *Id.* at 1045 n.10.

Moreover, the Court noted that in applying the detailed standards, Alabama trial courts are required to " 'reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages.' " 111 S. Ct. at 1044. Finally, in addition to applying these standards, the Alabama Supreme Court "undertakes a comparative analysis," comparing the award at issue with awards in other cases. *Id.* at 1045.

In contrast, the judicial review of the award in this case was utterly lacking in objective standards. Unlike Alabama, Oklahoma has not identified any meaningful factors for trial and appellate courts to consider in reviewing punitive damages awards. Rather, like the courts of Vermont and Mississippi, Oklahoma courts will set aside or modify an award only if it is "grossly excessive" and "so out of proportion as to be unconscionable," or is "the result of the jury's passion, prejudice or improper sympathy." *Chandler* v. *Denton,* 741 P.2d 855, 868 (Okla. 1987); accord, *Timmons* v. *Royal Globe Ins. Co.*, 653 P.2d 907, 918-19 (Okla. 1982). The lack of meaningful, objective criteria means that Oklahoma courts can make only ad hoc, intuitive judgments about the propriety of a particular award, "substituting [their] own notion[s] of excessiveness for that of the jury." *Mattison* v. *Dallas Carrier Corp.*, 947 F.2d 95, 105 (4th Cir. 1991); see *id.* at 106 (finding that such standardless review is not "meaningful" under *Haslip*).

That is precisely what happened here. Indeed, in this case the trial court not only did not examine objective factors similar to those identified in *Haslip,* but it did not even determine whether the amount of punitive damages

was "grossly excessive" or the result of "passion, prejudice or improper sympathy." The court merely stated that the issue of punitive damages was properly *submitted* to the jury and that the statutory cap was appropriately lifted by the trial court before submission to the jury. App., *infra*, 22a.[19] It undertook no analysis of whether the amount actually imposed by the jury was excessive. Such review, which falls far short of the type of meaningful "on the record" review conducted by the trial court in *Haslip*, fails to provide *any* constraint on the amount of the punishment.

The review of the Oklahoma Court of Appeals was scarcely better. That court did not engage in any "comparative analysis" of the award in relation to awards in similar cases,[20] nor did it apply any "detailed substantive

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[19] The existence of the statutory cap obviously provides no constraint on the jury's discretion once that cap is lifted. Moreover, the fact that the trial court lifted the cap before submitting the case to the jury merely indicates that the trial court found "clear and convincing evidence" that the defendant's conduct met the statutory standard. It obviously does not show that the trial court determined, *ex ante*, that any amount of punitive damages eventually imposed by the jury would be appropriate.

[20] The court did cite three cases in which the Oklahoma Supreme Court had ordered remittitur: *Chandler* v. *Denton*, 741 P.2d 855 (Okla. 1987); *Buzzard* v. *Farmers Ins. Co., Inc.*, 824 P.2d 1105 (Okla. 1991); and *Timmons* v. *Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982). See App., *infra*, 18a-19a. But the court relied on these cases solely for the proposition that it had the authority to direct remittitur if the jury's award was " 'grossly excessive' " or " 'influenced by passion, prejudice or improper sympathy.' " *Id.* at 18a. It did not compare the punitive damages award in this case to the awards in those cases to determine whether this award was excessive. Indeed, if it had done so, it would have recognized that even after remittitur, the award in this case was far in excess of the punitive awards in the cited cases. See *Chandler*, 741 P.2d at 867-68 ($250,000 awarded for *intentional* infliction of emotional distress, invasion of privacy, trespass, and wrongful taking of property, where defendant's conduct was "extreme and outrageous" and plaintiff suffered "severe emotional distress"); *Buzzard*, 824

standards" comparable to those applied by the Alabama Supreme Court in *Haslip*. See 111 S. Ct. at 1045.[21] In-

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P.2d at 1116 ($400,000 awarded for *bad faith* breach of insurance contract); *Timmons*, 653 P.2d at 918-19 ($1.5 million awarded for insurer's *malicious* breach of duty to deal fairly and act in good faith).

[21] In an effort to show that the judicial review in this case was analogous to that of the Alabama courts in *Haslip*, the court of appeals stated that application of the "'grossly excessive'" and "'influenced by passion, prejudice or sympathy'" standards of review "contemplate[s] consideration of the *reasonableness* of the award in relation to, for example, (1) cause and extent of injury, (2) the deterrence objective of punitive damages, (3) the actual damages awarded, (4) net worth of the defendant, and (5) the nature and egregiousness of defendant's conduct." App., *infra*, 13a-14a (footnotes and emphasis omitted). It further stated that "[t]he Trial Court undertook a review of the punitive damage award under the same standards as this appellate court," and that these standards "meet due process safeguards." *Id.* at 14a.

In fact, however, it is quite clear from the trial court's opinion that the trial court never applied any such standards. See App., *infra*, 21a-23a. Moreover, despite its recitation of these standards, the court of appeals itself never discussed them or explained why they permitted a $5 million punishment. It simply concluded that the jury's $10 million punishment was excessive and that $5 million was not. *Id.* at 20a.

Furthermore, in contrast to the Alabama Supreme Court (see *Haslip*, 111 S. Ct. at 1043-44), the Oklahoma Supreme Court has never established a set of standards for trial and appellate courts to consider in reviewing punitive damages. That court, like the court of appeals here, simply makes an ad hoc determination of whether an award is "grossly excessive" or was the result of "passion, prejudice or improper sympathy." See, *e.g.*, *Buzzard*, 824 P.2d at 1116 (stating only that "we believe that the large award of punitive damages was likely a result of 'an improper sympathetic response . . . larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated'"); *Chandler*, 741 P.2d at 868 ("When the $500,000 punitive damages award is added to the other amounts recovered, the total verdict becomes so grossly excessive that we cannot in reason allow it to stand."); *Mitchell* v. *Ford Motor Credit Co.*, 688 P.2d 42, 46 (Okla. 1984) (stating merely that the award "was far from excessive when considered in light of the facts adduced and of the [defend-

stead, it simply concluded that the jury's exaction of $10 million " 'is larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated,' is 'not . . . properly responsive to the legitimate objective of a punitive damage award,' and is 'so . . . excessive that we cannot in reason allow it to stand.' " App., *infra*, 20a. As noted above (at page 11), the court never explained *why* it considered the $10 million punishment excessive, or why $5 million—which was still 50 times larger than the compensatory award and more than 1840 times larger than out-of-pocket losses —was not excessive.[22]

Rather than proving a "definite and meaningful constraint" on the jury's award of punitive damages, the court of appeals' decision merely substituted the court's own ad hoc judgment of the proper amount of punishment for the jury's. Despite the fact that the court of appeals reduced the jury's punitive damages award in this case, then, Oklahoma's system of judicial review fails to provide sufficient constraints on juries' discretion in imposing punitive damages to satisfy procedural due process.

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ant's] disclosed net worth"). Finally, even if the vague "considerations" mentioned by the court of appeals were regularly considered by Oklahoma courts, they are hardly analogous to the "detailed substantive standards" applied by the Alabama Supreme Court in *Haslip*.

[22] The court added in a footnote that it was "concerned" that evidence of "indifference" to the risk of injury due to misidentification and counsel's "impassioned argument" combined to " 'create an improper sympathetic response,' " by the jury and "result[ed] in a 'damage award larger than reason dictates.' " App., *infra*, 19a n.45. This comment may explain why the jury imposed such severe punishment. But it fails to explain why the appellate court's $5 million punishment is not itself still irrationally excessive.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

W. MICHAEL HILL
EDWARD J. MAIN
Secrest & Hill
7134 South Yale, Suite 900
Tulsa, Oklahoma 74316
(918) 494-5905

REUBEN DAVIS
FREDERIC N. SCHNEIDER, III
WILLIAM C. KELLOUGH
Boone, Smith, Davis, Hurst & Dickman
500 Oneok Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000

ANDREW L. FREY *
KENNETH S. GELLER
MICHAEL A. VATIS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

* *Counsel of Record*

June 1993

APPENDICES

APPENDIX A

RELEASE FOR PUBLICATION BY ORDER
OF THE COURT OF APPEALS

IN THE COURT OF APPEALS
OF THE STATE OF OKLAHOMA

DIVISION NO. III

Case No. 75,446 cons. w/ Case No. 76,604

RONDA SCRIBNER, APPELLEE

VS.

HILLCREST MEDICAL CENTER, APPELLANT

and

DR. L. KHADEMOL REZA, DEFENDANT

APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY, OKLAHOMA

HONORABLE ROBERT J. SCOTT, JUDGE

AFFIRMED ON CONDITION

W. Michael Hill
Edward J. Main,
SECREST & HILL,
Oklahoma City, Oklahoma,

Reuben Davis,
Frederic N. Schneider, III,
William C. Kellough,
BOONE, SMITH, DAVIS, HURST & DICKMAN,
Tulsa, Oklahoma,
For Appellant,

W. C. Sellers, Jr.,
W. C. "BILL" SELLERS, INC.,
Oklahoma City, Oklahoma,
For Appellee,

James L. Hall, Jr.,
Clyde A. Muchmore,
Harvey D. Ellis, Jr.,
CROWE & DUNLEVY,
Oklahoma City, Oklahoma,
For Amici Curiae VHA of Oklahoma, Inc.,
and American Hospital Association,

Page Dobson,
Ronald R. Hudson,
Elizabeth J. Dunning,
HOLLOWAY, DOBSON, HUDSON & BACHMAN,
Oklahoma City, Oklahoma,
For Amicus Curiae
Oklahoma Hospital Association,

Andrew L. Frey,
Michael A. Vatis,
MAYER, BROWN & PLATT,
Washington, D.C.,

Fredric J. Entin,
James A. Henderson,
Margaret J. Hardy,
American Hospital Association,
Chicago, Illinois,
For Amicus Curiae
American Hospital Association.

Memorandum Opinion by Robert L. Bailey, Presiding Judge:

In principal case No. 75,446, Appellant Hillcrest Medical Center (Hospital) seeks review of judgment entered on jury verdict awarding $100,000.00 in actual damages and $10,000,000.00 in punitive damages to Appellee Ronda Scribner (Patient) in Patient's medical negligence action. In consolidated Case No. 76,604, Hospital seeks review of the Trial Court's order denying Hospital's post-trial motion to vacate the judgment for punitive damages. In the principal appeal, Hospital alleges (1) failure of Patient's proof of causation, (2) error in instruction of the jury on the theory of res ipsa loquitur, (3) under several propositions, error in instruction and submission of the issue of punitive damages to the jury, and (4) excessiveness of the punitive damage award. In the consolidated action, Hospital asserts error of the Trial Court in denying Hospital's motion to vacate the punitive damage award, arguing unconstitutionality of Oklahoma's punitive damage statute, and again arguing excessiveness of the punitive damage award. Amici Curiae join in the attack on the award of punitive damages.

Patient underwent an apparently uncomplicated hysterectomy at Hospital under the surgical care of Defendant Dr. Reza on October 1, 1985, and Hospital placed Patient in Bed B of a semi-private room to recover. Hospital moved the patient occupying Bed A of the same room elsewhere in the facility in the early morning hours of October 2 but Hospital staff failed to note the move in its records.[1]

Later on the morning of October 2, within twenty-two hours of surgery, an orderly seeking the Bed A patient appeared in Patient's room [2] and announced his intention

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[1] Two shifts of nurses failed to note the move of the patient in the adjoining bed.

[2] Notwithstanding having treated the Bed A patient in her new room, nursing staff directed the orderly the Patient's room to find the Bed A patient.

to take Patient to the ultrasound laboratory for testing. Patient protested that she had just come from surgery, had been instructed not to move without direction, and that she knew of no scheduled test. Nevertheless, the orderly persisted, and without checking Patient's identity,[3] the orderly lifted Patient from her bed, Bed B, to place her in a wheelchair. Patient testified she then felt excruciating pain and nearly passed out. The orderly proceeded to take Patient to the ultrasound lab.

At the ultrasound laboratory, technicians there noticed Patient's weakened condition and obvious pain. Notwithstanding, and without checking Patient's identity, the technicians commenced the ultrasound procedure by introduction of cold water through a catheter into Patient's bladder. Patient testified she experienced a wave of cramp-like pain as a result. At that point, upon further remonstrations by Patient, the laboratory technicians determined Patient's true identity, discontinued the ultrasound procedure, and returned Patient to her room. The technicians, however, failed to notify Patient's attending Nurse of the mistake.[4]

Patient discharged from Hospital about a week after surgery. However, two days later, Patient suffered an incisional dehiscence[5] and hernia, necessitating further surgery, although Patient apparently sustained little or no permanent impairment as a result of the second surgery.

At trial, Patient presented testimony of the orderly that he ignored Patient's protests, that he did not check

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[3] Patient wore a traditional hospital identification bracelet, and Patient's bed bore her name.

[4] Only after confrontation by Patient's doctor was a notation of the mistake entered in Patient's records.

[5] "A bursting open, splitting, or gaping along natural or sutured lines." Stedman's Medical Dictionary, 25th Ed. (Williams and Wilkens, 1990).

Patient's identification before taking her to the ultrasound laboratory, and demonstrating the orderly's ignornance of hospital procedures for patient identification. Patient also presented expert testimony tending to show causation of the incisional dehiscence attributable to strain and pulling during Patient's mistaken trip to the ultrasound laboratory. Patient also showed Hospital's net worth approaching $110,000,000.00

Hospital presented testimony of other experts contradicting Patient's evidence of causation. Defendant Dr. Reza testified that abdominal distension suffered by Patient during the initial hospitalization caused a suture to tear, resulting in the incisional dehiscence and hernia. Dr. Reza denied causal connection between the abandoned ultrasound procedure and the incisional dehiscence.

Based on the evidence, the Trial Court found Patient had clearly showed Hospital's "lackadaisical attitude" toward patient identification procedures, evincing "a reckless and wanton disregard of the rights of" Patient so as to potentially allow an award of punitive damages in excess of actual damages determined.[6] The Trial Court then instructed the jury on the issue of punitive damages over objection of Hospital.

The jury returned its verdict for Patient, awarding $100,000.00 in actual damages, and $10,000,000.00 in punitive damages. Hospital appealed judgment entered on jury verdict for Patient in principal Case No. 75,446. Hospital subsequently moved to vacate the award of punitives, which the Trial Court denied. Hospital appealed the order denying the motion to vacate in Case No. 76,604, and the matters have been consolidated for resolution.

We address Hospital's attack on Patient's proof of causation first. On this issue, Hospital asserts incom-

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[6] 23 O.S. Supp. 1986 § 9.

petency of Patient's expert testimony attributing causation of the incisional dehiscence to the strain and movement of the mistaken trip to the ultrasound laboratory as unsupported in medical literature [7] and contrary to all other expert testimony offered at trial. By this argument, however, Hospital in essence urges this Court to re-weigh the evidence of Patient's otherwise qualified experts, which we may not and will not do.[8] We therefore reject this allegation of error.

Next, Hospital attacks the award of punitive damages. In its first subproposition, Hospital argues the issue should not have been presented to the jury at all. In other words, while the conduct complained-of might be negligent, such conduct does not evince evil intent, the functional equivalent of such intent, or a conscious and knowing disregard of Patient's rights by Hospital so as to justify submission of the issue of punitive damages to the jury. In its related second subproposition, Hospital argues the complained-of conduct did not rise to the requisite level of culpability to justify lifting the punitive damages "cap" imposed by statute, that is, that the punitive damages award cannot exceed the amount of actual damages awarded.

An award of punitive damages is controlled by statute which provides:

> A. In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of conduct evincing a wanton or reck-

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[7] See, e.g., *Downs v. Longfellow Corp.*, 351 P.2d 999 (Okl. 1960) (weight of opinion no greater than reasons given in support thereof; opinion without rational basis has no probative force).

[8] See, *Leeper v. Thorton*, 344 P.2d 1101 (Okl. 1959) (where expert allowed to testify as such, soundness of his opinions, conclusions and deductions go to weight of testimony, not admissibility, and weight accorded such testimony for determination of trier of fact).

> less disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of actual damages awarded. Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing defendant, and the percentage limitation on such damages set forth in this section shall not apply.
>
> B. The provisions of this section shall be strictly construed.

23 O.S. Supp. 1986 § 9.

A party may be held liable for punitive damages under the "wanton or reckless disregard" standard if the party is shown to be "aware of, or culpably indifferent to, unnecessary risk of injury." [9]

In the instant case, Patient presented evidence showing Hospital's adoption of policies for patient identification, supporting at least an inference that Hospital recognized the risk of injury to patients due to misidentification. Patient also presented evidence clearly demonstrating ignorance of or failure to adhere to the patient identification policies by Hospital nurses, the orderly, and laboratory technicians. The Trial Court found Patient's evidence of Hospital's indifference to its own patient identification

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[9] *Thiry v. Armstrong World Industries*, 661 P.2d 515, 518 (Okl. 1983).

procedures clearly and convincingly [10] supported a finding of conduct equivalent to "reckless disregard for the rights of another" warranting both submission of the issue of punitive damages to the jury [11] and lifting the statutory "cap" on punitive damages. We agree with the Trial Court's assessment of the evidence and reject these allegations of error.

In its third subproposition attacking the punitive damages award, Hospital urges error in the Trial Court's instruction to the jury concerning punitive damages [12] as (1) impermissibly deviating from the punitive damage instruction prescribed by the Oklahoma Uniform Jury Instructions—Civil [13] and (2) lacking direction to the

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[10] "Clear and convincing" evidence is that which supports a conclusion free from serious or substantial doubt of correctness. Black's Law Dictionary (5th Ed., West, 1979).

[11] *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 918 (Okl. 1982) (person may commit such wilful acts in reckless disregard of another's rights that malice may be inferred). See also, e.g., *Mitchell v. Ford Motor Credit Co.*, 688 P.2d 42 (Okl. 1984) (reckless disregard); *Dilworth v. Fortier*, 405 P.2d 38 (Okl. 1965) (gross negligence or reckless disregard).

[12] The Trial Court's instruction provided:

> If you find in favor of [Patient] and grant her actual damages, and if you find the conduct of [Hospital] amounted to a wanton or reckless disregard for the rights of another, then you may, in addition to actual damages, grant exemplary damages in such sum as you reasonably believe will punish and be an example to others.
>
> Exemplary damages are not to be construed as compensation to the [Patient], but as a punishment to the Defendants, and as an example to others to deter them like conduct.

[13] The Oklahoma Uniform Instruction on punitive damages provides:

> If you find in favor of Plaintiff (name), and grant him actual damages, and if you find the conduct of Defendant, (name), (was or amounted to):

jury on Patient's "heightened" burden of proof of entitlement thereto. In this subproposition, Hospital asserts that the statutory mandate requiring the Trial Court to find "clear and convincing" evidence of sufficiently egregious conduct as a condition to lifting the punitive damages "cap" requires Patient to adduce "clear and convincing" evidence of such conduct to justify an award of punitive damages, and Hospital maintains the Trial Court erred in failing to so instruct. In a separate proposition, Hospital also attacks the Trial Court's instruction to the jury on the theory of res ipsa loquitur.

As to the Trial Court's instruction regarding punitive damages, we first note the Trial Court's instruction is nearly identical to the OUJI instruction, the Trial Court merely omitting non-applicable language from the OUJI version, and we find no error thereby. Second, Hospital did not request a "clear and convincing" instruction to be given, and Hospital's requested instruction [14] did not ac-

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> Fraud;
> Oppression;
> Gross negligence;
> Malice (actual or presumed);
> Evil intent;
> Reckless and wanton disregard of another's rights;
>
> as defined herein, then you may, in addition to actual damages, grant Plaintiff, (name), exemplary damages in such sum as you reasonably believe will punish Defendant, (name), and be an example to others.
>
> Exemplary damages are not to be construed as compensation to the Plaintiff, (name), but as punishment to the Defendant, (name), and as an example to others to deter them like conduct.
>
> In no event should the exemplary damages exceed ————.

OUJI-Civ. No. 5.5.

[14] Hospital's requested instruction on burden of proof for punitive damages directed that "punitive damages may be imposed only where the evidence plainly shows oppression, fraud, malice or gross negligence."

curately state the law.[15] The punitive damage instruction given by the Trial Court appears otherwise free of fundamental error,[16] and we find no error as alleged in this proposition.

As to the Trial Court's instruction on res ipsa loquitur, we likewise find no error. Under that doctrine, negligence may be inferred from the mere happening of an accident upon a showing that (1) the injury-causing instrumentality was under the exclusive care and control of the defendant and (2) the event causing the injury was of a kind which does not ordinarily occur in the absence of negligence.[17] As we view the record, we find presentation of some expert evidence by Patient attributing cause of Patient's incisional dehiscence and attendant second surgery to the stress and strain of the unnecessary trip to the ultrasound lab which would not have occurred if Hospital patient identification procedures had been followed. Even Hospital admits a mistake in this regard. Under these circumstances, we cannot say the Trial Court erred in giving a res ipsa loquitur instruction.

In its fourth subproposition of the principal appeal attacking the award of punitive damages, and again on appeal from the order denying Hospital's motion to vacate, Hospital challenges the constitutionality of the Oklahoma punitive damage statute, arguing the statute lacks a sufficient definition of both (1) culpable conduct and (2) limits of jury discretion on the amount of punitive

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[15] *Timmons*, 653 P.2d at 914, 918 (where trial court instructs generally, and party desires more specific instruction, party has duty to request more specific instruction; "[i]f a requested instruction is objection[able] in any respect, refusal to so charge the jury with the instruction is not error.")

[16] See, e.g., *Croy v. Bacon Transport Co.*, 604 P.2d 137 (Okl. 1979).

[17] 76 O.S. 1991 § 21; *St. John's Hospital School of Nursing v. Chapman*, 434 P.2d 160 (Okl. 1967).

damages allowable, in violation of Hospital's due process rights.[18] Under this proposition, Hospital asserts the due process guarantee protects against such "grossly excessive," "severe and oppressive" damage awards.

We find the United States Supreme Court has recently discussed this issue.[19] While not addressing the more general question of "whether 'undue jury discretion to award punitive damages' violates the Due Process Clause of the Fourteenth Amendment," [20] the Supreme Court found no due process violation in a punitive damage award under jury instruction in accord with Alabama law,[21] reasoning:

> So far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself deny due process. (Citation omitted.) In view of this consistent history, we cannot say that the common-law method of assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional. . . . Nothing in the [Fourteenth] Amendment's text or history indicates an intention on the part of its drafters to overturn the prevailing method. (Citations omitted.)
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> . . .
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> . . . The instruction . . . enlightened the jury as to the punitive damages' nature and purpose [deterrence and retribution, valid state concerns], identified the damages as punishment for civil wrongdoing of the

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[18] U.S. Const., Amendment XIV; Okl. Const., Art. 2, § 7.

[19] *Pacific Mutual Life Ins. Co. v. Haslip*, —— U.S. ——, 111 S.Ct. 1032 (1991).

[20] *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1046 (Scalia, J. concurring in judgment).

[21] *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1044-1045.

> kind involved, and explained that their imposition was not compulsory.
>
> These instructions . . . reasonably accommodated [defendant's] interest in rational decision making and [the state's] interest in meaningful individualized assessment of appropriate deterrence and retribution. The discretion allowed under [state] law in determining punitive damages is no greater than that pursued in many familiar areas of law as, for example, deciding "the best interests of the child," or "reasonable care," or "due diligence," or appropriate compensation for pain and suffering or mental anguish. (Footnote omitted.) As long as the discretion is exercised within reasonable constraints, due process is satisfied. (Citations omitted.)

Pacific Mutual Life Ins. Co., 111 S.Ct. at 1044.

As applied to the present case, we observe that the instruction given in *Pacific Mutual Life Ins. Co.* is nearly identical to that given in the instant case,[22] "enlighten[ing] the jury as to the punitive damages' nature and purpose, identify[ing] the damages as punishment for civil wrongdoing of the kind involved, and explain[ing] that their imposition was not compulsory."[23] Because the Oklahoma punitive damage statute specifically restricts such an award to cases of particularly egregious conduct for the purposes of punishment and deterrence and does not compel an award thereof in any certain case, under the U.S. Supreme Court's rationale we hold the Oklahoma punitive damage statute is not violative of Hospital's due process guarantees for lack of definition of culpable conduct or limits on jury discretion as alleged.

In a related argument, Hospital also claims that Oklahoma law unconstitutionally lacks substantive standards of review for awards of punitive damages, both at the

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[22] *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1037, footnote 1.

[23] *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1044.

trial level and on appeal, also in violation of Hospital's due process rights. However, the U.S. Supreme Court tacitly rejected this allegation in *Pacific Mutual Life Ins. Co.*, holding only that:

> . . . [G]eneral concerns of *reasonableness and adequate guidance . . . to the jury* properly enter the constitutional calculus.

111 S.Ct. at 1043. (Emphasis added.)

Under this pronouncement, we discern no constitutional due process violation in the "grossly excessive" or "influenced by passion, prejudice or sympathy" standards of review for punitive damages employed in this state.[24] Application of both standards contemplate consideration of the *reasonableness* of the award in relation to, for example, (1) cause and extent of injury,[25] (2) the deterrence objective of punitive damages,[26] (3) the actual damages awarded,[27] (4) net worth of the defendant,[28] and (5) the nature and egregiousness of defendant's con-

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[24] See, e.g., *Buzzard v. Farmers Ins. Co.*, 824 F.2d 1105 (Okl. 1991); *Chandler v. Denton*, 741 P.2d 855 (Okl. 1987); *Timmons*, 653 P.2d at 915.

But cf., *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1045, footnote 10.

[25] See, e.g., *Hobbs v. Watkins*, 481 P.2d 746 (Okl. 1970).

[26] See, e.g., *Buzzard*, 824 P.2d at 1116 ("[T]he large award of punitive damages was likely a result of 'an improper sympathetic response . . . larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated.'").

[27] *Chandler*, 741 P.2d at 868 ("In light of the generously and amply compensated loss for Chandler's actual harm, we find the exemplary damages allowed by the jury not to be responsive to the purpose of civil punishment.")

[28] *Mitchell*, 688 P.2d at 46; *Thiry*, 661 P.2d at 518. See also, *Basden v. Mills*, 472 P.2d 889 (Okl. 1970) (in absence of evidence of defendant's net worth, remittitur of punitive damages ordered).

duct,[29] standards implicitly recognized as proper for consideration by the United States Supreme Court.[30] The Trial Court undertook a review of the punitive damage award under the same standards as this appellate court on Hospital's motion to vacate and, contrary to Hospital's allegations, we hold the standards of review applied meet due process safeguards.

Hospital also asserts invalidity of the award as contrary to the constitutional prohibitions of excessive fines.[31] As before, we find Hospital's allegation of violation of the excessive fine prohibition controlled by U.S. Supreme Court decision.[32] In that case, the Supreme Court held:

> . . . [T]he Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clause's reach may be, we now decide . . . that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded. To hold otherwise, we believe, would be to ignore the purpose and concerns of the Amendment, as illuminated by its history.

Browning-Ferris Industries of Vermont, 109 S.Ct. at 2914.

The U.S. Supreme Court reasoned that the Constitutional drafters intended the Excessive Fines Clause to

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[29] *Timmons,* 653 P.2d at 915 (Okl. 1982) (punitive damages held "partially the result of the combined impact of the several wrongful and willful acts of the defendants and combined effect of these items of evidence influenc[ing] the jury . . . [and] creat[ing] an improper sympathetic response of a damages award larger than reason dictates to be necessary to deter such conduct.")

[30] *Pacific Mutual Life Ins. Co.,* 111 S.Ct. at 1044.

[31] Okl. Const., Art. II, § 9. See also, U.S. Const., Amendment VIII.

[32] *Browning-Ferris Industries of Vermont v. Kelco Disposal,* 492 U.S. ——, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).

prohibit excessive payments to "a sovereign as punishment for some offense," and to "plac[e] limits on the powers of the new government." [33] Applying this reasoning to the instant case, and considering the identity of language in the Eighth Amendment to the U.S. Constitution and Art. II, § 9 of the Oklahoma Constitution, we are similarly persuaded that the Oklahoma Constitutional drafters expressed the same intent to restrict the powers of state government, and did not propose by Art. II, § 9 to limit damage awards in disputes between private individuals. We therefore find the Excessive Fines Clause of the Oklahoma Constitution inapplicable to this controversy.

In its fifth subpropostion, Hospital alleges immunity from liability for punitive damages as a "not-for-profit," tax exempt corporation. However, and notwithstanding any tax exemption to which Hospital might be entitled for its "charitable" works,[34] such corporations enjoy *no* immunity "from liability for torts by reason of any exemption accorded them." [35] We therefore reject Hospital's claim of immunity from punitive damages.

In a related argument advanced both in the principal and consolidated appeal, Hospital asserts improper argument of Patient and counsel inflaming the jury. By this argument, Hospital maintains Patient should not have been allowed to give an opening statement *pro se*. Hospital also claims Patient's counsel, throughout the trial, repetitively and improperly employed prejudicial remarks and argument to inflame the jury and inflate Patient's damages award.[36] However, we find no reversible error

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[33] *Browning-Ferris Industries of Vermont*, 109 S.Ct. at 2915.

[34] 26 U.S.C.S. § 501(c)(3) (Lawyer's Co-op, 1992).

[35] *Gable v. Salvation Army*, 186 Okl. 687, 100 P.2d 244 (Okl. 1940).

[36] Hospital variously complains that counsel improperly (1) "harped on the theme of [Hospital] as an unfeeling, impersonal cor-

arising from Patient's *pro se* opening statement.[37] Nor do we find any reversible error arising from counsel's alleged prejudicial remarks,[38] to the vast majority of which Hospital failed to object at trial,[39] and we cannot say the remarks rise to the level of plain error as Hospital avers.[40] We therefore reject these allegations.

Hospital also claims improper consideration of Hospital's net worth leading to an inflated and excessive punitive damage award. In this allegation, Hospital argues "the verdict was excessive due to bias on the part of the jury because its members knew [Hospital] had a 'deep pocket.' " [41] However, Oklahoma law has consistently allowed consideration of a defendant's net worth for purposes of assessing punitive damages.[42]

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poration," (2) confused the jury with his imprecise "per diem" and other suggested mathematical means of calculating Patient's damages, (3) asked the jurors to "to identify [Patient] with the general community and . . . to place themselves in the position of [Patient]," and (4) interjected argument into the voir dire process.

[37] See, e.g., *Funnell v. Funnell*, 737 P.2d 105 (Okl. 1985); *Jefferson v. British American Oil Producing Co.*, 193 Okl. 599, 145 P.2d 387 (1944); *Rourke v. Myers*, 184 Okl. 46, 84 P.2d 639 (1938); *Oklahoma State Bank of Ada v. Mitchell*, 179 Okl. 567, 66 P.2d 920 (1937).

[38] Judgment will not be reversed for improper argument of counsel unless it is clearly shown that improper remarks influenced the verdict. See, e.g., *Middlebrook v. Imler, Tenny & Kugler, M.D.'s, Inc.*, 713 P.2d 572 (Okl. 1985); *Willis v. Fried*, 629 P.2d 1255 (Okl. 1981). See also, *Mikel Drilling Co. v. Dunkin*, 318 P.2d 435 (Okl. 1957) (clear showing of prejudice required for reversal); accord, *Beck v. Day*, 178 Okl. 310, 62 P.2d 1014 (1937).

[39] See, e.g., *Bane v. Anderson, Bryant & Co.*, 786 P.2d 1230 (Okl. 1989).

[40] 12 O.S. 1991 § 2104(D).

[41] *Smith v. United States Gypsum Co.*, 612 P.2d 251, 255 (Okl. 1980).

[42] *Woods Petroleum Corp. v. Delhi Gas Pipeline Corp.*, 700 P.2d 1023 (Okl. App. 1983); *Mitchell*, 688 P.2d at 46; *Thiry*, 661 P.2d

In its last proposition, Hospital again complains of the size of the verdict for punitive damages as "clearly excessive" and "influenced by passion and prejudice." So, says Hospital, the punitive damages award must be reversed (or minimally) reduced by remittitur. On this issue, the Oklahoma Supreme Court has recognized:

> Punitive damages are allowed for the benefit of society as punishment. They are designed to provide a restraint upon the transgressor and to serve as a warning and example to the wrongdoer. (Footnote omitted.) A punitive damages verdict lies peculiarly within the province of the jury and it will not be casually interfered with on appeal when it is claimed to have been actuated by passion or prejudice. (Footnote omitted.) Unless the verdict appears to be *grossly excessive or the result of the jury's passion, prejudice or improper sympathy,* it will not be conditioned on remittitur. But *where an award is found so out of proportion as to be unconscionable, a conditional affirmance, subject to remittitur, may be required.*

Chandler, 741 P.2d at 868. (Emphasis added.)[43]

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at 518; *Smith,* 612 P.2d at 255; *Chowins v. Gypsy Oil Co.,* 185 Okl. 630, 95 P.2d 586 (1939); *Smith v. Autry,* 69 Okl. 28, 169 P. 623 (1918); *Willet v. Johnson,* 13 Okl. 563, 76 P. 174 (1904).

As Justice O'Connor has observed:

> . . . The 'Constitution does not require the States to subscribe to any particular economic theory.' *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 92, 107 S.Ct. 1637, 1652, 95 L.Ed.2d 67. . . . Blackstone remarked that the '*quantum,* in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and at all events, what is ruin to one man's fortune, may be a matter of indifference to another's.' 4 Blackstone Commentaries *371.

Browning-Ferris Industries of Vermont, 109 S.Ct. at 2933.

And cf., *Basden,* 472 P.2d at 891, footnote 24, *supra.*

[43] See also, *Buzzard,* 824 P.2d at 1116; *Timmons,* 653 P.2d at 915.

The Oklahoma Supreme Court has directed remittitur in few cases under the "grossly excessive," "influenced by passion, prejudice or improper sympathy" standards. In *Chandler v. Denton,* the jury awarded $600,000 in actual damages and $500,000 in punitive damages. The Supreme Court directed remittitur of punitive damages in excess of $250,000, finding:

> . . . The $600,000 [actual damages] recovery . . . is . . . ample and generous. When the $500,000 punitive damages award is added to the other amounts recovered, the total verdict becomes so grossly excessive that we cannot in reason allow it to stand. In light of the generously and amply compensated loss for Chandler's actual harm, we find the exemplary damages allowed by the jury not to be responsive to the purpose of civil punishment.

Chandler, 741 P.2d at 868.

In *Buzzard v. Farmers Ins. Co., Inc.,* the jury awarded $200,000.00 in actual damages ("not an insignificant sum"[44]) for "distress occasioned by withholding a $10,000.00 insurance payment," and $2,000,000.00 in punitive damages for bad-faith breach of the insurance contract. The Supreme Court directed remittitur of $1,600,000.00 in punitive damages, finding:

> [T]he large award of punitive damages was likely a result of 'an improper sympathetic response . . . larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated.'

Buzzard, 824 P.2d at 1116.

In *Timmons v. Royal Globe Ins. Co.,* the jury awarded about $9,000 in actual damages, $25,000 for mental pain and suffering and $3,000,000 in punitive damages for

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[44] 824 P.2d at 1116.

breach of duty of fair dealing and good faith. In directing remittitur of $1,500,000.00 in punitive damages, the Supreme Court held:

> . . . [The] purpose [of an award of punitive] damages is to restrain the defendant and to deter other from the commission of similar wrongs. Upon review, such damages will not be held excessive unless it appears they are grossly so, or the result of passion, prejudice, or improper sympathy. It is the solemn and considered judgment of this Court that three million dollars awarded as punitive damages is partially the result of the combined impact of the several wrongful and willful acts of the defendants and that the combined effect of these items of evidence influenced the jury so as to create an improper sympathetic response of a damages award larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated. Thus the award is held not to be properly responsive to the legitimate objective of a punitive damage award, ...

Timmons, 653 P.2d at 915.

Under the direction of these cases,[45] we have reviewed the evidence and argument of counsel at trial of the in-

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[45] In *Timmons,* the Supreme Court expressed concern that the "combined impact of the [evidence] of the several wrongful . . . acts of the defendants . . . influenced the jury . . . to create an improper sympathetic response of a damages award larger than reason dictates" in reaching a conclusion for remittitur. 653 P.2d at 915. In *Buzzard,* the Supreme Court expressed similar concerns in ordering remittitur. 824 P.2d at 1116. We are likewise concerned in the instant case that the "combined impact" of (1) the evidence of Hospital's indifference to the risk of injury to patients due to misidentification and (2) counsel's impassioned argument similarly "influenced the jury . . . to create an improper sympathetic response," and resulting in a "damage award larger than reason dictates."

stant matter. We are of the opinion that the $10,000,-000.00 punitive damage award in the present case is "larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated," is "not . . . properly responsive to the legitimate objective of a punitive damage award," [46] and is "so . . . excessive that we cannot in reason allow it to stand." [47] We therefore hold the $10,000,000.00 award of punitive damages should be affirmed, conditioned on remittitur of $5,000,-000.00 thereof. If Patient fails to file such remittitur, the entire judgment on jury verdict should be reversed, and the matter remanded for new trial.

The order of the Trial Court denying Hospital's motion to vacate and judgment entered on jury verdict is therefore AFFIRMED, conditioned on remittitur of punitive damages of $5,000,000.00. HANSEN, V.C.J. and HUNTER, J. concur.

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[46] *Timmons*, 653 P.2d at 915.

[47] *Chandler*, 741 P.2d at 868.

APPENDIX B

IN THE DISTRICT COURT
IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

Case No. CJ-86-1210

RONDA SCRIBNER, PLAINTIFF

VS.

HILLCREST MEDICAL CENTER, DEFENDANT

ORDER OVERRULING DEFENDANT'S TERM TIME MOTION TO VACATE AWARD OF PUNITIVE DAMAGES

Oklahoma punitive damage statutes are not unconstitutional in depriving a Defendant of the due process requirements of the Fifth Amendment of the United States Constitution guaranteed under the Fourteenth Amendment thereof nor Section 7, Article II, of the Oklahoma Constitution, because of the absence of meaningful standards by which Jury discretion may be controlled in determining conduct necessary for the award of such type of damages or determining the amount of damages to be awarded.

Conduct necessary for the award is set forth with sufficient precision for the Jury to make this determination. See Title 23 O. S. Section 9, 1986; Slocum versus Phillips Petroleum Co., 769 P 2d. 146, Okl. 1989, at Page

149 under the syllabus 2 notation. In addition, the Court must make a determination that this conduct meets the statutory standards before the issue of punitive damages can be submitted to the Jury. Appellate Court review is also provided for both the determination by the Court and the finding by the Jury.

As to the amount of damages, after the Court has made the determination the evidence reflects the required conduct, the award of punitive damages is limited in amount not to exceed the amount of damages awarded, unless at the conclusion of the evidence and prior to submission of the case to the Jury, the Court finds that there is clear and convincing evidence that the Defendant's conduct is that described in the statutes. Even then, the Jury is not left to a "standardless discretion", but is permitted to award damages for the sake of example to others and by way of punishing the Defendant for the conduct reflected by the evidence and for which punitive damages are permitted under the statute.

The award of punitive damages under Title 23 O. S. Section 9, 1986, is not unconstitutional as an excessive fine (or punishment) under the Eighth Amendment of the Constitution of the United States nor under Article II, Section 9 of the Oklahoma Constitution. Browning-Ferris Industries versus Kelco Disposal, 492 U.S. —— 106 L. Ed. 2d 219, 109 S. Ct. 2909 (1989).

Submitting evidence of Defendant's wealth on issue punitive damages is not prejudicial error. Smith versus U.S. Gypsum Co., 61 P 2d 251, Okl. 1980.

Tax exempt status under Federal Internal Revenue Code Section 501 (c) (3), does not create immunity for tort liability and its consequent punitive damages. In Gable versus Salvation Army, 100 P 2d. 244, Okl 1940, the Oklahoma Supreme Court even rejected such immunity for charitable corporations. 501 (c) (3) tax exempt status has never been the basis for immunity from tort

even in jurisdictions that historically recognize such immunity for charitable corporations.

IT IS THEREFORE ORDERED AND ADJUDGED that the Term Time Motion to Vacate Award of Punitive Damages filed by the Defendant is overruled.

Dated this 11th day of October, 1990.

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District Judge

APPENDIX C

RELEASE FOR PUBLICATION IN THE
OKLAHOMA BAR JOURNAL
BY ORDER OF COURT OF APPEALS

DIVISION 3

November 6, 1992

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

75,446—Ronda Scribner, Appellee v. Hillcrest Medical Center, Appellant and Dr. L. Khademol Reza, Defendant.

Appellant's Petition for Rehearing is DENIED.

* * *

DONE BY ORDER OF THE COURT OF APPEALS IN CONFERENCE this 6th day of November, 1992.

/s/ Robert L. Bailey
ROBERT L. BAILEY
Presiding Judge

APPENDIX D

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Wednesday, March 17, 1993

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * *

75,446 (consolidated with 76,604) Ronda Scribner v. Hillcrest Center et al.
Certiorari denied.

CONCUR: Hodges, C.J., Lavender, V.C.J., Hargrove, Opala, Wilson, J.J.

DISSENT: Simms, Summers, Watt, J.J.

RECUSED: Kauger, J.

* * *

/s/ Ralph B. Hodges
Chief Justice

Supreme Court U.S.
FILED
JUL 12 1993
OFFICE OF THE CLERK

No. 92-1982

In The

Supreme Court of the United States

October Term, 1993

HILLCREST MEDICAL CENTER,

Petitioner,

v.

RONDA SCRIBNER,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Oklahoma

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. C. SELLERS
W. C. "BILL" SELLERS, INC.
P.O. Box 1404
Sapulpa, OK 74067-1404
918-224-5357 / FAX 224-5451

July 12, 1993

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QUESTIONS PRESENTED

1. Whether the judgment of the trial court upholding a punitive damage jury verdict, which was then conditionally upheld by the Oklahoma Court of Appeals upon remittitur by Respondent of $5,000,000 to which Respondent has agreed, satisfies the requisites of the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Whether Petitioner was afforded procedural due process of law.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 3

A. Trial Proceedings 5

B. Review by the Trial Court 10

C. Review by the Court of Appeals 11

NO REASON FOR CERTIORARI 12

A. Large Punitive Damage Judgments 15

PROCEDURAL DUE PROCESS 17

A. Jury Instruction 17

B. Wealth of Petitioner 18

C. The Trial Court and the Oklahoma Court of Appeals Conducted Meaningful Review 18

REPREHENSIBLE BEHAVIOR 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) 17

TXO Production Corp. v. Alliance Resources Corp., 61 U.S.L.W. 4766 (1993) ..... *passim*

CONSTITUTIONS AND STATUTES:

28 U.S.C. § 1257(a) 1

Okla. Stat. tit. 23, § 9(A) (1987) 2

U.S. Const. amend. XIV 2

No. 92-1982

In The

Supreme Court of the United States

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JURISDICTION

The Respondent agrees that this court's only jurisdiction would be under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has raised only the Fourteenth Amendment to the United States Constitution, and only the following language therefrom:

> No State shall * * * deprive any person of * * * property without due process of law * * * .
>
> U.S. Const. amend. XIV

Although Petitioner has cited the Oklahoma statute on punitive damages, it has not argued that such statute violates any provision of the United States Constitution. Oklahoma's punitive damages statute is found at Okla. Stat. tit. 23, § 9(A) (1987):

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of actual damages awarded. Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing the defendant, and the percentage limitation on such damages set forth in this section shall not apply.

STATEMENT

The Petitioner in this case is seeking this Court's review after having received a fair trial by jury in an Oklahoma trial court and substantive appellate review in the Oklahoma Supreme Court resulting in the benefit to Petitioner of a five-million-dollar ($5,000,000.00) remittitur. It is Petitioner who sought remittitur as a remedy in the Oklahoma Supreme Court. Having received the remedy it sought, Petitioner's complaint now seems to be that the remittitur was not as large as Petitioner would like it to be.

On October 1, 1985 Respondent, Ronda Scribner, was admitted to Petitioner, Hillcrest Medical Center, for a full abdominal hysterectomy with bilateral salpingo-oophorectomy. On October 2, 1985, within twenty-two (22) hours of this major surgery, Respondent was mistaken for another patient and wrenched from her hospital bed, despite her protests, to begin an ultrasound treatment that was not ordered for her. This assault and battery by Petitioner's employees caused Respondent's suture from her hysterectomy to rupture and tear which eventually led to a wound dehiscence and an incisional hernia, a life-threatening condition. The injury to Respondent was not the result of one single mistake, but the result of a pervasively reckless system of patient care which Petitioner condones and encourages.

Respondent had a difficult and painful first hospital stay which was longer than usual for a hysterectomy. The difficulty was caused by the undiagnosed tear in Respondent's suture caused by Petitioner's reckless acts. Respondent was then forced to undergo a second surgical

procedure to repair her incisional hernia which required general anesthetic, along with a subsequent hospital stay. Respondent was then billed by Petitioner for the extra hospital stays and medical treatment caused by Petitioner's recklessness.

Petitioner's employees testified that at the time of the assault and battery upon Respondent in 1985, they were unfamiliar with Petitioner's own procedural rules for identifying and locating patients.

Five years later, at the trial of this case in 1990, Petitioner had still failed to adequately train its employees on proper identification of patients and patient tracking. Petitioner's orderly who actually grabbed Respondent despite her protests, testified that he was still not familiar with Petitioner's rules for orderlies to follow in patient identification. The orderly's supervisor testified that such rules did not apply to his department.

Witnesses sponsored by both parties testified that the acts of negligence and/or assault and battery by Petitioner's employees evinced a reckless or wanton disregard for the rights of Respondent. (Transcript pp. 157-160, 177-178, 298). The trial court made a finding on the record, outside the presence of the jury, that there was clear and convincing evidence upon which reasonable men and women would not differ that the conduct of Petitioner was a reckless or wanton disregard of Petitioner's rights. Pursuant to Oklahoma's punitive damage statute, the trial court lifted the statutory "cap" on punitive damages. The jury returned a verdict for Respondent

in the amount of $100,000.00 in actual compensatory damages and $10,000,000.00 in punitive damages.

Petitioner appealed the judgment and also filed a motion to vacate the punitive damage portion of the judgment and asked for a remittitur. The trial court overruled Petitioner's motion and Petitioner appealed this ruling to the Oklahoma Supreme Court asking for a reversal as to punitive damages or, again, a remittitur. The Oklahoma Supreme Court consolidated the two appeals and referred the case to the Oklahoma Court of Appeals which affirmed the judgment of the trial court on condition that Respondent agree to a remittitur of $5,000,000.00. Respondent filed her acceptance of the remittitur with the Court of Appeals. Petitioner then petitioned the Oklahoma Supreme Court for certiorari seeking a reversal as to punitive damages or a larger remittitur. The Oklahoma Supreme Court denied certiorari.

Petitioner now complains that the remedy of remittitur that it sought and was given is not large enough. Respondent seeks to be able to dictate to the Oklahoma Supreme Court the amount which the remittitur should be. In effect, Petitioner seeks to be able to reduce the punitive damages awarded in this case to an amount that is not punitive to Petitioner at all.

A. Trial Proceedings

The strength of the judgment in this case and the inherent weakness of Petitioner's arguments both rest on the pervasively reckless or wanton attitude, actions and demeanor of Petitioner, and its agents, servants and

employees. (Transcript, pp. 277-288). Petitioner, to this day, stubbornly refuses to see that its actions with respect to Respondent were in reckless or wanton disregard of her rights.

Respondent, a human being, who had placed herself in the fiduciary care of Petitioner and its employees, was dragged about within Petitioner hospital with less care about her identity than had she been an animal in a veterinary clinic. For Petitioner to take the mule-like position that such conduct is not reckless requires nothing short of the punitive damages affirmed in this case.

The undisputed facts speak for themselves. Even though Respondent's name was clearly and unambiguously emblazoned in bold black letters over her bed, an orderly recklessly disregarded that information and wrenched Respondent from her bed within 22 hours of having her abdomen surgically opened from hip bone to hip bone. Even though Respondent's name was clearly and unambiguously written on her hospital-provided armband, this same orderly recklessly disregarded that information. Even though Respondent raised a protest about whether she should have an ultrasound test, this same orderly recklessly disregarded her entreaties.

If this conduct was not reckless enough, this same orderly cared so little about the identity of the patient he was dragging around the hospital, he did not even bother to ask Respondent her name. (Transcript pp. 125-131)

But, the orderly's reckless actions did not stand alone. He was aided and abetted by the two shifts of nursing staff, an ultrasound technician, the supervisor of ultrasound, and Petitioner itself.

The orderly and his supervisor were unfamiliar with Petitioner's rules and regulations regarding proper identification and location of patients. Petitioner did not bother to educate them. In fact, the supervisor and his personnel testified that such rules did not apply to the orderly's department. (Transcript, pp. 169-170, 262-263). At trial, five years *after* Respondent had been misidentified and injured by the orderly, Petitioner had still not bothered to train its orderly on proper identification and location of patients.

The pervasively reckless conduct of the Petitioner's personnel continued when the ultrasound technician, to whom the orderly delivered Respondent, also recklessly disregarded the name on Respondent's armband. The ultrasound technician recklessly failed to address Respondent by name before the technician began to fill Respondent's bladder with half of a quart of cold water. (Transcript p. 186)

Petitioner had promulgated its own "Patient Bill of Rights," which stated that a patient had a right to have the necessity of any procedure explained to her by her doctor before that procedure. Plaintiff's Trial Exhibit 2. When Respondent questioned the necessity for the ultrasound procedure with the orderly, he recklessly dismissed her concerns. (Transcript pp. 130-131). When Respondent questioned the necessity for the ultrasound procedure with the ultrasound technician, her pleas were recklessly dismissed again. When the ultrasound technician saw Respondent's surgical incision and called the nurses' station, Respondent heard the technician use the name of the lost patient. The Respondent protested that the name the ultrasound technician used on the phone

call to the nurses' station was not her name. It was only then that the ultrasound technician cared enough to find out Respondent's name.

Of course, the reason Respondent was placed at jeopardy in the first place was because Petitioner had misplaced *another* patient. This was the patient who was actually supposed to have the ultrasound test. This lost patient was moved from bed 10613 A in Respondent's room to some other room. (Video Deposition of Ann Tomlinson, March 7, 1990, pp. 85-7) (Transcript pp. 120-121). Respondent was in bed 10613 B. When the orderly went in to room 10613 he saw that bed A was empty. Bed A was where the lost patient was supposed to be. Instead of finding out where the lost patient had gone, he recklessly went to the next bed, bed B, and grabbed Respondent. This orderly testified that such conduct was not reckless and he saw no risk in it. (Transcript p. 127).

Two shifts of nurses failed to note the room change in the records of the lost patient which had been in bed 10613 A, in flagrant violation of Petitioner's regulations and the ordinary standard of care. (Tomlinson Video Depo., March 7, 1990, p. 94; Transcript, p. 119; plaintiff's trial exhibit 12). The nurses know that this is dangerous. (Tomlinson Video Depo. March 7, 1990, pp. 107-109). The nurse in charge of the lost patient directed the orderly to the wrong room, according to the orderly, even though that nurse had just placed a foley catheter in the lost patient in her new room. (Transcript, p. 121; Tomlinson Depo., pp. 118-119).

The ultrasound technician failed to obey her supervisor and inform Respondent's nurse that Respondent

had been wrongfully taken to an ultrasound procedure. (Tomlinson Video Depo., March 7, 1990, p. 37). This technician only noted the incident in Respondent's record after Respondent's doctor had found out what happened and had angrily confronted Respondent's nurse. (Transcript p. 202).

Respondent never felt well after her excruciating experience in being assaulted without cause by Petitioner's personnel. After a longer than usual hospital stay for such a hysterectomy, Respondent was sent home in obvious distress. When she was finally forced to return to the hospital because her intestines were protruding from her body, she was again placed under general anesthetic and her incisional hernia was repaired by a second surgery. To add insult to the injury that Petitioner had caused, Petitioner billed Respondent for the second surgery and the extra days of hospital stay on the first surgery. (Plaintiff's Trial Exhibit 10)

Respondent's testimony as to what happened to her in the hospital was unrefuted and was in fact admitted by Petitioner. Petitioner only disputed that it's actions caused Respondent's wound dehiscence and subsequent incisional hernia. Petitioner claimed it should not be held liable for making an "honest mistake." (Transcript, p. 705).

At the close of the evidence, the trial court, pursuant to Oklahoma law, made a finding on the record, outside the presence of the jury, that there was clear and convincing evidence that Petitioner's conduct evinced a reckless or wanton disregard for the rights of the Respondent.

> * * * I find that the evidence is clear and convincing and at (sic) that the conclusion is unmistakable and free from any substantial doubt that there was a lackadaisical attitude towards handling the check procedures for the purpose of identifying a patient so that the institution could make certain that the proper procedures were performed on the proper patient. And on that basis I will submit the issue of punitive and exemplary damages and I will remove the statutory lid of actual damages under 23 OS 9.
>
> * * *
>
> * * * And I believe that the – it would be a reckless and wanton disregard. And it would be – I would conclude that the lackadaisical attitude would create a reckless and wanton disregard of the rights of the patient.

(Transcript pp. 603 & 605).

Respondent's out of pocket damages for medical bills and lost wages were at least $4,367.26, including $1,651.00 for the extra days in the first hospital stay, $2,093.03 for the second hospital stay, and $623.23 for lost wages. (Transcript p. 697).

B. Review by the Trial Court

Petitioner did not file a motion for new trial, but instead filed a "Term Time Motion To Vacate Award of Punitive Damages" (Term Time Motion). During the pendency of this motion, the Petitioner filed its appeal of the trial court's judgment.

The trial court ruled on the Petitioner's Term Time Motion after considering Respondent's Response to the Term Time Motion and Petitioner's Reply to Respondent's Response. Among other arguments, the Petitioner raised objections to the punitive damage award citing provisions of the state and federal constitutions as authority. Petitioner asked for remittitur as a remedy. Petitioner claims the trial court failed to "examine whether the jury's award was so excessive as to violate substantive due process." Contrary to that assertion by Petitioner, the trial court found that its judgment did not violate any provision of the Oklahoma or United States Constitutions. The trial court's "Order Overruling Defendant's Term Time Motion To Vacate Award Of Punitive Damages" was filed on October 11, 1990. The Petitioner then filed another petition in error with the Oklahoma Supreme Court concerning this order.

C. Review by the Court of Appeals

On appeal to the Oklahoma Supreme Court, both the appeal of the trial court judgment and the appeal of the denial of the Term Time Motion were consolidated and sent to the Oklahoma Court of Appeals for review. Both of these appeals included requests for remittitur by the Petitioner. The Oklahoma Court of Appeals concluded, among other things, that no provisions of the federal or state constitutions were violated by the punitive damage judgment. The Court of Appeals then affirmed the trial court's $10,000,000 punitive damage judgment on condition that the Respondent agree to a remittitur of $5,000,000. Respondent agreed to the remittitur in writing filed with the Court of Appeals.

Even though the Petitioner had been granted the remedy of remittitur for which it had asked (although, not in the amount for which it had asked), the Petitioner still sought review of the Court of Appeals opinion by the Oklahoma Supreme Court by way of writ of certiorari. The Oklahoma Supreme Court denied certiorari.

NO REASON FOR CERTIORARI

The Petitioner has articulated no sound reason why this Court should grant certiorari in this case. The paramount reason for this Court denying certiorari is that Petitioner has claimed it has been deprived of due process, yet it has been given the benefit of the very process for which it asked. Petitioner has benefitted by the legal process of the Oklahoma appellate review by exactly the remedy it invoked – remittitur. Petitioner's only concern is that it was not afforded the *amount* of remittitur which it wanted. Petitioner's position flies in the face of the entire body of law concerning punitive damages. If Petitioner, guilty of acts justifying punitive damages, is allowed to prescribe the amount of punitive damages to be assessed against it, those damages will never be punitive.

Petitioner is squealing like a "stuck pig," because the punitive damage judgment in this case hurts. Petitioner has missed the point. Punitive damages are supposed to hurt, and they are supposed to hurt a defendant more than the defendant thought it could be hurt. Unpredictability is the essence of punitive damages.

Predictable punitive damages would no longer be actually punitive. This is because a defendant could then calculate his risk for errant conduct beforehand to ascertain when such conduct would be cost-beneficial. If punitive damages are ever cost-beneficial, they are no longer actually punitive.

This Court has just decided the case of *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (1993). In this Court's considered opinion, the procedure by which punitive damages should be awarded is decided by and should remain with the individual States. Even JUSTICE O'CONNOR in her *TXO* dissent agreed that:

> * * * although it might be convenient to establish a multipart test and impose it upon the States, the principles of federalism counsel against such a course. The States should be permitted to "experiment with different methods" of ferreting out impermissible awards "and to adjust these methods over time."
>
> *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766, 4777 (1993)

The *TXO* plurality found that punitive damage judgments which have run the gamut of fair jury trial through a state's appellate process are entitled to a very high degree of presumption that such judgments are sound.

> * * * The members of the jury were determined to be impartial before they were allowed to sit, their assessment of damages was the product of collective deliberation based on evidence and the arguments of adversaries, their award was

> reviewed and upheld by the trial judge who also heard the testimony, and it was affirmed by a unanimous decision of the State Supreme Court of Appeals. Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, see Haslip, 499 U.S., at 24-40 (SCALIA, J., concurring in judgment), or virtually so, id., at 40-42 (KENNEDY, J., concurring in judgment).
>
> *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. at 4769.

In a concurring opinion, JUSTICE SCALIA and JUSTICE THOMAS echoed this sentiment in more definite terms:

> The jury in this case was instructed on the purposes of punitive damages under West Virginia law, and its award was reviewed for reasonableness by the trial court and the West Virginia Supreme Court of Appeals. Traditional American practice governing the imposition of punitive damages requires no more.
>
> *TXO Production Corp.*, 61 U.S.L.W. at 4773.

In the case at bar, the Petitioner got a fair jury trial, review by the trial court of the punitive damage award, review by the Court of Appeals, remittitur by the Court of Appeals, and denial of certiorari by the Oklahoma Supreme Court. Petitioner has run the gamut of process which was its due in the Oklahoma courts and has greatly benefitted from the run. Taking this Court's words to heart, the presumption that such a judgment is valid

should be virtually irrebuttable. Petitioner has offered no reason for rebutting the presumption other than the punitive damage judgment, as subject to remittitur, is still too large.

A. Large Punitive Damage Judgments

This Court has now made clear that the ratio between compensatory damages and punitive damages is never dispositive of whether a punitive damage award is violative of due process.

> Thus, both State Supreme Court and this Court have eschewed an approach that concentrates entirely on the relationship between actual and punitive damages. It is appropriate to consider the magnitude of the potential for harm that the defendants conduct would have caused . . . as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.
>
> *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. at 4770.

However, such a ratio is the basis for Petitioner's complaint that the punitive damage judgment in this case is too large. (Petitioner's Brief pp. 3, 9(n. 8), 12, 16, 26). Even so, the ratio between punitive damages and actual damages was only 100 to 1 before remittitur, whereas the ratio in *TXO* was 526 to 1. After remittitur, the ratio in this case is in the neighborhood of 50 to 1.

Petitioner never touches on the harm and potential harm which its conduct caused the Respondent or might cause others in the future. Petitioner does not want to

talk about this because Petitioner's conduct physically injured Respondent and placed her in a life-threatening situation. Petitioner's conduct forced Respondent to submit to the risk of general anesthetic and additional surgery. After injuring Respondent and the surgery required to repair the injury, Petitioner callously billed Respondent for the trouble.

Worse yet, Petitioner had still not trained the same personnel which misidentified and injured Respondent in the proper procedures for patient identification by the time of the jury trial of this case, five years later. The potential for harm to others in a hospital which stubbornly refuses to properly train personnel in proper patient identification procedures is catastrophic. Petitioner argues that there was no evidence at trial that any other patients had been misidentified, yet it glosses over the fact that the patient for whom Respondent was mistaken, was herself lost in the reckless patient identification and location system condoned and encouraged by Petitioner.

The *TXO* dissent by JUSTICE O'CONNOR expressed surprise at the size of the *TXO* punitive damage award because it did not involve serious personal injury, implying that such a large punitive damage award that did involve personal injury would not be particularly surprising.

> A comparison of this award and prior ones in West Virginia confirms its unusual nature: It is 20 times larger than the highest punitive damages award ever upheld in West Virginia history for any misconduct. * * * That figure is particularly surprising if one considers the nature of

> the offense at issue. This is not a case involving grave physical injury imposed upon a helpless citizen by a callous malefactor. Rather, it is a business dispute between two companies in the oil and gas industry.
>
> *TXO Production Corp.*, 61 U.S.L.W. at 4776-7.

In the case at bar, Respondent was a helpless citizen who did suffer grave personal injury at the hands of a callous malefactor. Petitioner, the malefactor in this case, is so callous that it wants to characterize its actions as "honest mistakes." Petitioner has argued that it should not be held liable at all for these "honest mistakes."

PROCEDURAL DUE PROCESS

In light of this Court's decision in the *TXO* case that a virtual irrebuttable presumption of validity attaches to a punitive damage judgment which has been through a fair trial and has completed state appellate court review, Petitioner's argument that the Oklahoma procedure on punitive damages and the appellate review thereof is constitutionally infirm has no basis in fact or law.

A. Jury Instruction

The jury instruction given in the case at bar on punitive damages was substantially similar to that given by the trial court in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1037 n.1 (1991). This Court determined such an instruction did not violate any provisions of the United States Constitution. Additionally, the instruction in the case at bar was given to the jury only after the trial

court found by a clear and convincing burden of proof, that there was sufficient evidence that Petitioner's conduct evinced a reckless or wanton disregard of Respondent's rights. This is an additional procedural safeguard for defendants under Oklahoma's punitive damages statute as applied in this case.

B. Wealth of Petitioner

This Court has determined that the admission of evidence of a defendant's wealth in a punitive damages lawsuit does not violate any provision of the United States Constitution.

> * * * We note, however, that in Haslip we referred to the "financial position" of the defendant as one factor that could be taken into account in assessing punitive damages, see n. 28, supra.

TXO Production Corp., 61 U.S.L.W. at 4771.

Therefore, the evidence of the Petitioner's net worth which was admitted at trial did not violate any provision of the Constitution of the United States.

C. The Trial Court and the Oklahoma Court of Appeals Conducted Meaningful Review

Post trial, the trial court, after considering the extensive briefs of both parties on the issue of the amount of the jury's verdict in this case, issued its "Order Overruling Defendant's Term Time Motion To Vacate Award Of Punitive Damages." This order expressly found no violation of the state or federal constitutions. Petitioner has

criticized the trial court for failing to articulate its reasons for upholding the verdict, however, the *TXO* plurality clearly puts this argument to rest.

> * * * While it is always helpful for trial judges to explain the basis for their rulings as thoroughly as is consistent with the efficient despatch of their duties, we certainly are not prepared to characterize the trial judge's failure to articulate the basis for his denial of the motions for judgment notwithstanding the verdict and for remittitur as a constitutional violation.

TXO Production Corp., 61 U.S.L.W. at 4772.

Therefore, Petitioner's argument as to the trial court's review has no basis in law.

For the Petitioner to then argue that the review by the Court of Appeals was not meaningful is patently absurd. The Court of Appeals granted Petitioner's request for a remittitur. The Court of Appeals determined the remittitur should be in the amount of $5,000,000. If a $5,000,000 remittitur is not meaningful to Petitioner, then the remaining punitive damage award after remittitur, should likewise be of little meaning to the Petitioner. As such, the remaining punitive damage award cannot violate any right which Petitioner claims under the United States Constitution.

———— ♦ ————

REPREHENSIBLE BEHAVIOR

Petitioner has asserted in its Petition that its actions carried a "relatively low degree of 'reprehensibility'." Petition for Writ of Certiorari, p. 17. However, it is difficult to imagine more reprehensible conduct which reflects a more callous attitude than the Petitioner refusing to train its employees in proper patient identification procedures. Petitioner's callous and reckless attitude toward patient identification inevitably is magnified through the day-to-day activities of its ill-trained staff. The nightmarish conclusion of such reckless conduct is exactly the scenario which was before the jury in this case – Petitioner performed procedures on the wrong patient. Fortunately, Respondent survived. The next patient may not be so fortunate. There is no doubt that given Petitioner's non-existent identification procedures and Petitioner's assertions that this event was of little consequence, that such occurrences are the antithesis of a rarity - they are routine.

Petitioner must be taught that this conduct does not amount to "honest mistake" or a "low degree of reprehensibility." For the public's sake, Petitioner must learn that its conduct is intolerable in a civilized society. Petitioner must learn that its conduct in the case at bar is more reprehensible and presents a greater potential for harm if left unchecked than the conduct between two oil companies dealing at arm's length on an oil deal. *See TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (1993).

CONCLUSION

Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

W. C. SELLERS
W. C. "BILL" SELLERS, INC.
600 S. Main / P. O. Box 1404
Sapulpa, OK 74067-1404
918-224-5357 / FAX 224-5451

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MARTIN F. CONNOR
THE AMERICAN TORT REFORM ASSOCIATION
1212 New York Avenue, N.W.
Washington, D.C. 20003
(202) 682-1163

KEITH A. TEEL*
JOSEPH K. DOSS
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5501

Attorneys for Amicus Curiae

* *Counsel of Record*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Tort Reform Association ("ATRA") respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of petitioner. Petitioner has consented to the filing of the accompanying brief in this Court. Counsel for the respondent has refused consent, necessitating the submission of this motion pursuant to Rule 37.2 of the Rules of this Court.

ATRA is a nonprofit association having a substantial interest in the outcome of this case. The four hundred members of ATRA include corporations, municipalities, associations, professional societies and public interest groups who have joined together to promote fairness, efficiency, balance and predictability in the civil justice system. ATRA's members are sometimes the targets of potentially ruinous punitive

damages claims, and as such have a vital interest in ensuring that this Court provide needed guidance to juries and judges who must decide whether punitive damages awards are consistent with the due process requirements of the United States Constitution.

ATRA is concerned that this Court's recent decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993), while reaffirming that the Constitution imposes due process limitations on the amount of punitive damages that may be awarded, nonetheless provided no clear standards for state and federal courts to apply when deciding whether a punitive damages award is excessive. Absent clarification by this Court, businesses and individuals will continue to be faced with ambiguous and unpredictable rulings. ATRA has a strong interest in this proceeding and can provide an important perspective on the issues presented in this case.

ATRA therefore respectfully requests that this Court grant its motion for leave to file the accompanying brief as *amicus curiae* in order to assist the Court in its consideration of the petition for certiorari.

Respectfully submitted,

MARTIN F. CONNOR
The American Tort
Reform Association
1212 New York Avenue, N.W.
Washington, D.C. 20003
(202) 682-1163

KEITH A. TEEL*
JOSEPH K. DOSS
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5501
Attorneys for Amicus Curiae
THE AMERICAN TORT REFORM
ASSOCIATION

July 16, 1993

* *Counsel of Record*

QUESTION PRESENTED

Whether the five million dollar punitive damages award in this case violates the substantive due process requirements of the United States Constitution.

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. *HASLIP* and *TXO* Failed to Provide Sufficient Guidance Concerning the Due Process Limitations on an Award of Punitive Damages	3
II. The Petitioner's Conduct Cannot Support the Grossly Excessive Punitive Damages Awarded to the Respondent	5
CONCLUSION	10

TABLE OF AUTHORITIES

Page

TXO Production Corp. v. *Alliance Resources Corp.*, 61 U.S.L.W. 4766 (June 25, 1993) ..... *passim*

Pacific Mutual Life Ins. Co. v. *Haslip*, 111 S. Ct. 1032 (1991) ..... *passim*

INTEREST OF AMICUS CURIAE

The American Tort Reform Association ("ATRA") is a nonprofit association representing over four hundred businesses, corporations, municipalities, associations, professional societies and public interest groups. ATRA was formed in 1986 to promote fairness, efficiency, balance and predictability in the civil justice system, particularly in the development and application of tort law. ATRA respectfully submits this brief in support of Hillcrest Medical Center's petition for writ of certiorari. ATRA has submitted *amicus* briefs to the Court in all recent cases involving the constitutionality of a punitive damages award.

This case is vitally important to ATRA and its members. ATRA believes that the rampant acceleration in the number and size of punitive damages awards is not due to some upturn in blameworthy conduct by defendants. Instead, this phenomenon is fueled by the recognition of litigants that many jurisdictions impose few if any limits on these awards. As a result, plaintiffs, in even the most trivial cases, try to "get lucky" by convincing a jury to award millions of dollars in punitive damages. Fear of such liability serves as an unhealthy and unfair brake on our country's economy. Moreover, if, as in this case, the mere negligence of an employee can serve as the basis for an award of punitive damages, then no business with employees is safe from ruin.

In this brief, ATRA demonstrates that the Court's decisions in *TXO Production Corp.* v. *Alliance Resources Corp.*, 61 U.S.L.W. 4766 (June 25, 1993), and *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), mandate the invalidation of the punitive damages award in this case.

SUMMARY OF ARGUMENT

In *Haslip* and *TXO*, this Court recognized that the due process clauses of the United States Constitution impose substantive limitations on the size of a punitive damages award. In both cases, the Court declined to establish a "bright-line"

test for determining the constitutionality of an award, favoring instead a "reasonableness" test that requires the consideration of several factors. Following *Haslip*, the lower courts were plainly confused about how to apply this test, and many observers hoped that *TXO* would produce a clear test.

That did not happen, and juries and judges are still lacking direction on this important issue. Yet in TXO, seven members of this Court reaffirmed *Haslip's* recognition that a punitive damages award can be so excessive as to violate substantive due process limitations. Because *TXO* failed to identify clearly those limits, the confusion that followed *Haslip* is likely to continue. This case will permit the Court to clear up much of the confusion. Without requiring the Court to establish a "bright-line" rule, the Court may use this case to identify a situation in which the Constitution denies the validity of a punitive damages award.

The facts of the case are simple. A hospital established a patient identification procedure. Hospital employees were negligent in following this procedure, and as a result one patient was injured. The patient's injury was minor and she recovered completely. Moreover, there was no question of real or potential gain to the hospital, no evil motive on anyone's part, and no indication that similar problems had previously occurred. There was, however, evidence that the hospital was worth a great deal of money, and the record suggests that the inflammatory and passionate words of the plaintiff's attorney caused the jury to award a constitutionally excessive sum of punitive damages.

An analysis of these facts and the factors cited in *Haslip* and *TXO* shows that the decision below surely violates the Constitution. If it does not, then *Haslip* and *TXO* have no meaning. ATRA believes that the Court meant what it said in those cases: that an award can be so excessive that it violates due process, but that no bright-line test can be created to make this determination. Instead, as in so many areas, clarity will come incrementally through the consideration by this and other courts of various factual situations. But the necessary

scrutiny will not be given to such awards unless this Court shows that it is permissible for a reviewing court to look carefully at the facts of a case, reject characterizations of those facts that defy reason, and invalidate awards that by any measure are excessive. Accordingly, the Court should grant certiorari and invalidate the decision below, for a dispassionate review of the facts demonstrates that the punitive damages award made in this case was so excessive as to violate substantive due process limitations.

ARGUMENT

I. *HASLIP* AND *TXO* FAILED TO PROVIDE SUFFICIENT GUIDANCE CONCERNING THE DUE PROCESS LIMITATIONS ON AN AWARD OF PUNITIVE DAMAGES

The Court's recent decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993), and its earlier decision in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), established that the United States Constitution provides substantive due process limits on the discretion of juries and judges to award punitive damages. At some point, the amount of an award is too great, and in some situations punitive damages will be wholly improper. But the question lingers, especially after *TXO:* what are the limits? The Court seems united in the view that no "bright-line" test can be created to apply in every case. *TXO*, 61 U.S.L.W. at 4770. This may be true, but surely this Court can, through the consideration of specific factual circumstances, begin to define in a more precise manner those situations where a punitive damages award is constitutionally excessive. ATRA believes that the facts in this case will permit the Court to clear up much of the uncertainty that still permeates this important area of the law.

As the petitioner and the supporting *amici* demonstrated conclusively in their briefs to this Court in *TXO*, the constitutional limitations on the size of punitive damages awards were

poorly understood prior to the decision in *TXO*. In *Haslip*, the Court recognized that due process imposes both procedural and substantive limits on an award of punitive damages. 111 S.Ct. at 1043. With respect to the determination of excessiveness, the Court discussed with approval the substantive standards applied by Alabama courts in reviewing punitive damages awards. *Id.* at 1044-45. But after *Haslip*, state and federal courts reacted with confusion,[1] making it plain that further guidance was needed. Unfortunately, *TXO* failed to provide it, and there is little doubt that the confusion persists.

Justice Stevens' plurality decision in *TXO* reaffirmed that there are substantive due process limits on the size of a punitive damages award. The plurality, however, declined to establish an easily-applied rule for determining excessiveness, and instead merely repeated the standard enunciated in *Haslip* that " '[a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.' " 61 U.S.L.W. at 4770, quoting *Haslip*, 111 S. Ct. at 1043.

Several justices in *TXO* shared ATRA's concern that the plurality decision provides no guidance to juries and courts that must apply this ruling. Justice Kennedy, in a concurring opinion, stated that even after the Court's decision "we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it." 61 U.S.L.W. at 4772. Justices O'Connor and White, in a dissenting opinion, noted that the "plurality opinion erects not a single guidepost to help other courts find their way through this area." *Id.* at 4776. Justice Kennedy also pointed out that the "reasonableness" test articulated in *TXO* will provide a reviewing court

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[1] *See, e.g., Amicus Curiae* Brief of Product Liability Advisory Council, Inc. in Support of Petitioner, TXO Production Corp. v. Alliance Resources Corp., 61 U.S.L.W. 4766 (U.S. June 25, 1993); Brief *Amici Curiae* of Phillips Petroleum Co., United Services Automobile Association, and Allstate Insurance Co. in Support of Petitioner, TXO Production Corp. v. Alliance Resources Corp., 61 U.S.L.W. 4766 (U.S. June 25, 1993).

with "nothing more than its own subjective reaction to a particular punitive damage award in deciding whether the award violates the Constitution." *Id.* at 4772.

These concerns are plainly justified, but the problem is not insoluble. The Court can clarify this confused situation by seeking out a case that will permit it to do what it has not done before: invalidate a plainly unconstitutional award of punitive damages. When evaluated under the standards of *Haslip*, *Hillcrest Medical* presents the Court with a clear case of a constitutionally impermissible punitive damages award. By granting the petition for writ of certiorari, the Court can provide content to the reasonableness standard which was recognized in both *Haslip* and *TXO* as the test for determining whether a punitive damages award is constitutionally excessive.

II. THE PETITIONER'S CONDUCT CANNOT SUPPORT THE GROSSLY EXCESSIVE PUNITIVE DAMAGES AWARDED TO THE RESPONDENT

The *Hillcrest Medical* case differs significantly from *Haslip* and *TXO*. Both *Haslip* and *TXO* involved instances of intentional fraud or a pattern and practice of malicious behavior. *TXO*, 61 U.S.L.W. at 4773 (Kennedy, J., concurring); *Haslip*, 111 S.Ct. at 1041. In *Hillcrest Medical*, however, the petitioner's conduct was neither malicious nor intentional. At best, the evidence demonstrates that the hospital was merely negligent.

The basic facts are simple. A hospital orderly mistakenly moved a patient who was recovering from a hysterectomy from her bed to undergo an ultrasound test. The error was discovered while preparing the patient for the test and she was returned to her room. Her sutures later ruptured and she contended, and the jury apparently believed, that this was caused by her being mistakenly moved from her bed. Further surgery repaired the problem, with no lasting ill effects. On these facts a jury awarded her $100,000 in actual damages—

$97,000 of that was for pain and suffering—and ten million dollars in punitives, reduced by the Oklahoma Court of Appeals to five million dollars.

Hillcrest and ATRA contend that under no circumstances can this award be justified. It is shocking and plainly runs afoul of the constitutional limitations recognized in *TXO* and *Haslip*. While perhaps the orderly's arguably "reckless" conduct can be imputed to the hospital for purposes of determining compensatory damages, that conduct cannot, consistent with due process requirements, support an excessive award of punitive damages against an employer that, at best, was negligent. In *Haslip*, this Court upheld a punitive damages award under the respondeat superior doctrine because the defendant insurance company was aware of its agent's fraudulent behavior. 111 S.Ct. at 1041. In *TXO*, this Court noted that the corporation engaged in bad faith behavior and that there was a "pattern of fraud, trickery and deceit" on the part of its executive staff. 61 U.S.L.W. at 4771-72. In stark contrast, the award in *Hillcrest Medical* rests on the isolated "reckless" act of an orderly. There is no evidence that the hospital itself was anything more than negligent. This calls to mind Justice Kennedy's observation in his concurring opinion in *TXO* that "[a] case involving vicarious liability, negligence, or strict liability might present different issues" than the one presented in *TXO*, in which the defendant corporation engaged in fraudulent and deceitful conduct. 61 U.S.L.W. at 4773.

A comparison with *TXO* is instructive. Unlike the situation in *TXO*, this case presents no issue of "potential harm" to obfuscate the Court's consideration of the reasonableness of the punitive damage award. Clearly the hospital had nothing to gain by its employee's conduct. Performing improper tests on patients merely imposes costs on the hospital and risks potentially ruinous lawsuits. Nor can the hospital's actions be characterized in any way as fraudulent or malicious. The facts

clearly suggest that the hospital orderly simply made a mistake, albeit one that in light of the patient's protests should have been detected earlier.

What then could justify the excessive award made in the *Hillcrest* case? It is apparent that this is simply a case involving redistribution of wealth by a jury inflamed by a lawyer's passionate rhetoric. The evidence showed that the hospital had a net worth of $107 million. To understand precisely what happened in this case one need only review some of the comments made to the jury by the plaintiff's counsel:

> "Let me tell you something about punitive damages. A rich man won't pay his fines. . . . He'll accumulate his parking fines and violations and once every six months he'll send a hired girl or somebody on the payroll down to pay it. He doesn't go down there. . . . He's not intimidated by these small fines and parking fines, not the rich man, he's not. But we are. We have to pay our fines. . . . If you're going to make a rich man hear you you've got to to [sic] enough in money damages toward him that he hears you irrevocably. . . ."

TR. 685, 691.

> "I haven't seen the CEO of Hillcrest here, Chief Executive Officer. I haven't seen any members of the Board of Directors. I see a lady over there that's a hired hand that they sent down here to take their whipping for them. They're not here. . . . Do you know why they're not here? Because this isn't important to them. . . . They don't think that you citizens off the public street have enough gumption, enough common sense, enough character and enough guts to do something to get their attention.
>
> "Well, if you want to talk to the Board of Hillcrest up there and you want to send them a message they'll hear, then you have to find substantial damages in punitive damages in this case. . . . We're not animals in a veterinary clinic, we're people. . . .
>
> "These people drag in a $160,000,000 a year and they don't love us. . . . What is the matter with these people? And they are so oblivious out there to you they

> don't fear you, they don't respect you, they're not even here."

TR. 685-86, 690-91.

Plainly, a skillful lawyer convinced a jury to punish a defendant for being wealthy. In awarding or reviewing an award of punitive damages, the defendant's wealth may be a factor to be considered, but it should not be the only factor. Indeed, wealth is but one of seven factors which this Court in *Haslip* recognized as appropriate to consider when reviewing the constitutionality of a punitive damage award.[2]

Consideration of this award in light of the factors cited with approval by the Court in *Haslip* demonstrates the unreasonableness of the amount of punitive damages awarded below. The first *Haslip* factor is whether there is a reasonable relationship between the punitive damages award and the harm likely to result from defendant's conduct as well as the harm that actually occurred. 111 S.Ct. at 1045. Surely in this case there was no reasonable relationship between the amount of punitive damages awarded and the harm that actually occurred. The plaintiff suffered actual out-of-pocket damages of about $3,000, yet was awarded approximately 1,840 times that amount in punitive damages. And it is unlikely that the potential harm could have been any worse than what was experienced by this plaintiff. As noted above, there simply was no evidence that the hospital regularly failed to follow its procedures. This was a one-time occurrence.

The second *Haslip* factor focuses on the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct. *Id.* This factor plainly militates for the award of no punitive damages in this case. The defendant here was negligent at best. The

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[2] *See* 111 S. Ct. at 1045. These factors are repeated in the Petition for Certiorari at page 22.

conduct was a one-time occurrence, and there was no indication of any concealment.

The third *Haslip* factor, the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and having the defendant also sustain a loss, *id.*, was discussed above. There was and could have been no profit derived by the hospital in this case.

The fourth *Haslip* factor, the financial position of the defendant, *id.*, is seemingly the only factor applied in this case. Yet, to apply that factor alone, when nothing else suggests an award of punitive damages is appropriate, surely cannot be constitutional.

Fifth, *Haslip* suggested that the costs of litigation should be considered. *Id.* There is nothing in the record to indicate that costs were large. Indeed, the respondent probably bore no costs.

The sixth *Haslip* factor is whether criminal sanctions might be imposed, and if so such factors are to be taken in mitigation. *Id.* Here, it is unlikely that any criminal penalties could have been imposed for the conduct of the hospital.

Seventh, and finally, the existence of other civil awards against the defendant for the same conduct may be considered as a mitigating factor. *Id.* Again this factor seems to have no applicability to this one-time occurrence.

The substantive *Haslip* factors clearly mandate the invalidation of the award here. The Court of Appeals of Oklahoma, in reviewing the trial court's ruling, purported to engage in the type of procedural review called for in *Haslip*, and yet still upheld this award. *See* slip op., reprinted in Hillcrest's Petition for Certiorari, at pp. 11a-14a. But the facts suggest that this review was cursory and halfhearted.[3]

---

[3] In light of the fact that the court below has already purported to consider the award in light of *Haslip*, ATRA strongly believes that the Court should grant the petition for writ of certiorari. However, the Court should, at minimum, remand the case to the Court of Appeals of Oklahoma for further proceedings in light of *Haslip* and *TXO*.

Much more could be said, but it is plain that in allowing this award to stand the Court would sanction a miscarriage of justice. Seven members of this Court in *TXO* indicated that there are constitutional limitations on the size of a punitive damages award. Perhaps a bright-line test cannot be drawn, but more precise instructions can be given to the lower courts in an incremental fashion by highlighting those cases in which a punitives award is so excessive as to violate due process. This is such a case.

CONCLUSION

For the reasons stated above, the American Tort Reform Association respectfully urges this Court to grant Hillcrest Medical Center's petition for writ of certiorari.

Respectfully submitted,

MARTIN F. CONNOR
The American Tort
Reform Association
1212 New York Avenue, N.W.
Washington, D.C. 20003
(202) 682-1163

KEITH A. TEEL*
JOSEPH K. DOSS
COVINGTON & BURLING
1201 Pennsylvania Avenue,
N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-5501

Attorneys for Amicus Curiae
The American Tort
Reform Association

July 16, 1993

* *Counsel of Record*

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No. 92-1982

In The

Supreme Court of the United States

October Term, 1993

HILLCREST MEDICAL CENTER,

Petitioner,

v.

RONDA SCRIBNER,

Respondent.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of Oklahoma

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE AMERICAN HOSPITAL ASSOCIATION AND THE OKLAHOMA HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

FREDERICK PAGE DOBSON*
RONALD R. HUDSON
ELIZABETH J. DUNNING
HOLLOWAY, DOBSON, HUDSON & BACHMAN
211 N. Robinson Ave.
Suite 900
Oklahoma City, OK 73102
(405) 235-8593

Attorneys for Oklahoma Hospital Association

FREDRIC J. ENTIN
JAMES A. HENDERSON
MARGARET J. HARDY
American Hospital Association
840 N. Lakeshore Dr.
Chicago, IL 60611
(312) 280-6619

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN HOSPITAL ASSOCIATION AND THE OKLAHOMA HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of the Court, the American Hospital Association and the Oklahoma Hospital Association respectfully move this Court for leave to file the attached brief as *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief. This motion is made necessary by the refusal of respondent to grant consent.

The *amici*, major associations of hospitals in the United States and in Oklahoma, have a vital interest in the issue presented here: whether a hospital may be subjected to a multi-million dollar punitive damages award solely on the basis of the unintentional actions of its employees, even

where the hospital stands to gain nothing from those actions and where the punitive damages are grossly disproportionate to any actual or potential harm to the plaintiff. Enormous punitive exactions of this kind will force hospitals to increase greatly their expenditures on wasteful, liability-avoiding measures, driving up health care costs far out of proportion to any medical benefits.

This brief focuses on an issue that has not been, and probably will not be, discussed by the parties: the devastating effect that large punitive damages awards such as the one in this case are having on health care providers and on the cost and availability of health care. The brief also discusses why certiorari is warranted in this case in light of this Court's decision in *TXO Prod. Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993), which was decided after the petition for certiorari was filed. Because of the importance of the issues presented here to the *amici* and their members, *amici* seek leave to file this brief to assist the Court in the resolution of this case.

Respectfully submitted,

FREDERICK PAGE DOBSON*
RONALD R. HUDSON
ELIZABETH J. DUNNING
HOLLOWAY, DOBSON, HUDSON & BACHMAN
211 N. Robinson Ave.
Suite 900
Oklahoma City, OK 73102
(405) 235-8593

FREDRIC J. ENTIN
JAMES A. HENDERSON
MARGARET J. HARDY
American Hospital Association
840 N. Lakeshore Dr.
Chicago, IL 60611
(312) 280-6619

Attorneys for Oklahoma Hospital Association

*Counsel of Record

July 16, 1993

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICI CURIAE* 1

ARGUMENT 3

I. ABSENT MEANINGFUL LIMITATIONS, PUNITIVE EXACTIONS SUCH AS THE ONE IN THIS CASE WILL HAVE A DEVASTATING IMPACT ON THE HEALTH CARE INDUSTRY 3

II. THE $5 MILLION PUNISHMENT IN THIS CASE IS GROSSLY EXCESSIVE IN RELATION TO THE ACTUAL OR POTENTIAL HARM TO THE PLAINTIFF, TO ANY POTENTIAL GAIN TO THE HOSPITAL, AND TO THE REPREHENSIBILITY OF THE CONDUCT 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Lee, 603 So.2d 937 (Ala. 1992) 5

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 3

College Hosp., Inc. v. Superior Court, 16 Cal. Rptr. 2d 833 (Cal. Ct. App.), review granted, 19 Cal. Rptr. 2d 493 (Cal. 1993) 5

Hospital Auth. of Gwinnett County v. Jones, 409 S.E.2d 501 (Ga. 1991), cert. denied, 112 S.Ct. 1175 (1992) 5

Schroeder v. Lester E. Cox Medical Ctr., Inc., 833 S.W.2d 411 (Mo. Ct. App. 1992) 5

TXO Prod. Corp. v. Alliance Resources Corp., 61 U.S.L.W. 4766 (U.S. June 25, 1993) ..... *passim*

MISCELLANEOUS

AMA, *The Impact of Product Liability on the Development of New Medical Technology* (1988) 4

Financial Hardship Ahead for Hospitals, HFMA Predicts, J. of Accountancy 156 (Dec. 1987) 5

Franklin & Mais, *Tort Law and Mass Immunization Programs* (1977) 4

Friedman, *Hospital Uncompensated Care: Crisis?* 262 J.A.M.A. 2975-77 (1989) 5

Freudenheim, *Rising Number of Hospitals Forced to Close*, N.Y. Times, June 23, 1988, at A17 5

HHS, *Report of the Task Force on Medical Liability and Malpractice* 5 (1987) 3, 4, 5

TABLE OF AUTHORITIES – Continued

Page

59 *Hospitals* 40 (March 16, 1985) 4

P. Huber, *Liability: The Legal Revolution and Its Consequences* 156 (1988) 4

Manuel, *Professional Liability: A No-Fault Solution,* 322 New Eng. J. of Medicine 627 (1990) 3

Rostow, Osterweis & Bulger, *Special Report: Medical Professional Liability and the Delivery of Obstetrical Care,* 321 New Eng. J. of Medicine 1057, 1058 (1989) 3

Sieradzki, *Throwing Out the Baby with the Bathwater: Reform in the System for Compensating Obstetric Accidents,* Yale L. & Pol'y Rev. 538 (1989) 3

U.S. Dep't of Justice, *An Update on the Liability Crisis: Tort Policy Working Group* 51 (1987) 4

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BRIEF OF THE AMERICAN HOSPITAL ASSOCIATION AND THE OKLAHOMA HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The American Hospital Association ("AHA") is the primary national membership organization for hospitals in this country. It has approximately 5400 member hospitals and other health care organizations. The Oklahoma Hospital Association ("OHA") represents 127 hospitals in Oklahoma. The AHA and OHA share a common objective: to promote high-quality health care and health services for all through leadership and assistance to

hospitals in meeting the health care needs of their communities.

This case is of vital importance to hospitals, doctors, and other health care providers. At issue is whether a health care provider may be subjected to a multi-million dollar punitive exaction solely on the basis of the inadvertent, nonmalicious actions of its employees, even where the provider stands to gain nothing from those actions and where the punitive exaction is wildly out of proportion to any actual or potential harm to the plaintiff. Liability of this kind will force health care providers to increase drastically their expenditures on defensive, liability-avoiding measures, driving up health care costs far out of proportion to any benefits thereby derived.

Amici fully agree with the arguments presented in Hillcrest Medical Center's Petition for a Writ of Certiorari. They submit this brief to highlight the devastating effects that punitive damages awards such as the one in this case are having – and, absent clearer direction from this Court, will continue to have – on health care providers and the health care system. *Amici* also submit this brief to point out why the punitive damages in this case cannot survive this Court's recent decision in *TXO Prod. Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993).

ARGUMENT

I. ABSENT MEANINGFUL LIMITATIONS, PUNITIVE EXACTIONS SUCH AS THE ONE IN THIS CASE WILL HAVE A DEVASTATING IMPACT ON THE HEALTH CARE INDUSTRY

The skyrocketing increase in both the frequency and size of punitive damages awards in recent years[1] has contributed to a crisis in the health care industry. The soaring cost of malpractice insurance resulting from the increase in tort claims has forced many doctors to quit their profession or drastically raise their fees, decreasing the availability of health care for the community.[2] At the same time, product liability suits have profoundly retarded the development of new life-saving medical technologies and drugs.[3]

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[1] See *TXO Prod. Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766, 4782 (U.S. June 25, 1993) (O'Connor, J., dissenting).

[2] See, *e.g.*, Manuel, *Professional Liability: A No-Fault Solution*, 322 New Eng. J. of Medicine 627, 628 (1990) (noting that one in eight obstetricians stopped performing deliveries and 40% of surgeons ceased accepting high-risk cases because of the risk of malpractice suits). See also Sieradzki, *Throwing Out the Baby with the Bathwater: Reform in the system for Compensating Obstetric Accidents*, Yale L. & Pol'y Rev. 538, 540-41 & n.13 (1989); Rostow, Osterweis & Bulger, *Special Report: Medical Professional Liability and the Delivery of Obstetrical Care*, 321 New Eng. J. of Medicine 1057, 1058 (1989); HHS, *Report of the Task Force on Medical Liability and Malpractice* 5 (1987).

[3] See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("The threat of such enormous [punitive damages] awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid

Moreover, the threat of enormous damages awards forces hospitals and other providers to engage in costly and wasteful defensive practices – *i.e.*, performing medically unnecessary tests and procedures and eschewing innovative and valuable procedures for fear of incurring legal liability. See, *e.g.*, HHS, *Report of the Task Force on Medical Liability and Malpractice* 97 (1987) ("HHS Report") (estimating annual cost of "defensive medicine" at $10.6 billion); 59 *Hospitals* 40 (March 16, 1985) (placing cost of defensive medicine at between $15 billion and $40 billion annually). Hospitals in turn are forced either to pass the cost of such "defensive medicine" on to consumers or to curtail – or completely shut down – patient services. The rapid escalation in the size of punitive damages verdicts since the mid-1980s suggests that these costs today would be far greater.

Two factors make hospitals particularly vulnerable to the rising tide of huge punitive damages awards. First,

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uncertain liability than to introduce a new pill or vaccine into the market."); P. Huber, *Liability: The Legal Revolution and Its Consequences* 156 (1988) (noting that the threat of increased liability forced out half of the U.S. vaccine manufacturers from 1965 to 1985, and that by 1986 there was only one supplier of vaccines for polio, rubella, measles, mumps, and rabies); AMA, *The Impact of Product Liability on the Development of New Medical Technology* (1988); U.S. Dep't of Justice, *An Update on the Liability Crisis: Tort Policy Working Group* 51 (1987) (stating that an $8 million punitive damages award "could very well have jeopardized the viability of the entire polio vaccination program" had it not been reversed on appeal), Franklin & Mais, *Tort Law and Mass Immunization Programs* (1977) (discussing drug manufacturers' refusal to produce influenza vaccine until government agreed to assume risk of lawsuits resulting from injuries caused by vaccine).

hospitals engage in inherently risky activity. No amount of caution can ensure that every patient recovers or that mistakes are never made in diagnoses or treatment. Thus, hospitals have become the target for an increasing number of malpractice suits seeking punitive as well as compensatory damages. See, *e.g.*, *Atkins v. Lee*, 603 So.2d 937 (Ala. 1992) (upholding $6.875 million award of compensatory and punitive damages against hospital and doctor); *Hospital Auth. of Gwinnett County v. Jones*, 409 S.E.2d 501 (Ga. 1991) (affirming award of $5001 in compensatory damages and $1.3 million in punitive damages against hospital), cert. denied, 112 S.Ct. 1175 (1992).[4]

Second, the rising costs of services, which generally outstrip revenues, has placed many hospitals in dire financial condition.[5] Because they lack the profit margin

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[4] See also *College Hosp., Inc. v. Superior Court*, 16 Cal. Rptr. 2d 833 (Cal. Ct. App.) (holding that evidence of hospital administrator's failure to investigate allegations of negligence by doctor would justify punitive damages against hospital), review granted, 19 Cal. Rptr. 2d 493 (Cal. 1993); *Schroeder v. Lester E. Cox Medical Ctr., Inc.*, 833 S.W.2d 411 (Mo. Ct. App. 1992) (affirming award of $92,453 in compensatory damages and $400,000 in punitive damages against pharmacy); HHS Report 166 (malpractice claims against hospitals doubled between 1980 and 1985).

[5] See, *e.g.*, Friedman, *Hospital Uncompensated Care: Crisis?* 262 J.A.M.A. 2975-77 (1989) (large financial losses stemming from caring for uninsured, indigent, and Medicare and Medicaid patients have forced hospitals to lay off employees, shut down emergency or obstetric departments, or close entirely); *Financial Hardship ahead for Hospitals, HFMA Predicts*, J. of Accountancy 156 (Dec. 1987) (noting decrease in operating margins and increase in long-term debt and average age of plant); Freudenheim, *Rising Number of Hospitals Forced to Close*, N.Y.

of ordinary business enterprises, hospitals cannot absorb large punitive damages awards without reducing or eliminating vital health care services.

Thus, the $5 million punitive exaction in this case will inevitably take its toll on the hospital's ability to provide adequate remuneration for personnel, to renovate old buildings and purchase needed new equipment, and to maintain vital but costly services. In the end, then, the burdens of the enormous punishment imposed on Hillcrest for the negligence of its employees will be borne by the citizens it serves in the form of increased health care costs and reduced medical services.

Given this background, the importance of this case to health care providers is plain to see. At a time when, more than ever before, reforming our health care system and reducing costly and wasteful practices has become a national priority, huge liability judgments such as the one in this case are pressuring hospitals to *increase* the use of unnecessary defensive practices, therefore driving up the cost of health care without corresponding benefit to public health.

Absent further guidance from this Court as to the constitutional limitations on punitive damages, the number and amount of punitive exactions awards will continue to spiral upward, threatening the viability of health care providers – and thus the availability of health care – across the country. This Court therefore should

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Times, June 23, 1988, at A17, col. 1 (sharp increase in number of hospitals going out of business because of cut in Medicare payments; 48% of hospitals vulnerable to failure in five years).

grant certiorari in this case, or at least remand for further proceedings.

II. THE $5 MILLION PUNISHMENT IN THIS CASE IS GROSSLY EXCESSIVE IN RELATION TO THE ACTUAL OR POTENTIAL HARM TO THE PLAINTIFF, TO ANY POTENTIAL GAIN TO THE HOSPITAL, AND TO THE REPREHENSIBILITY OF THE CONDUCT

In *TXO*, this Court reiterated that the Due Process Clause imposes a substantive limit on the amount of punitive damages. 61 U.S.L.W. at 4769 (plurality opinion); *id.* at 4772-73 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 4776 (O'Connor, J., dissenting). Although the Court did not spell out in detail how to determine whether a particular punitive exaction is unconstitutionally excessive and was divided on the question whether the exaction in that case was excessive, the $5 million punishment imposed in this case is grossly excessive and therefore unconstitutional under each of the different approaches set forth in *TXO*. Hillcrest's punishment is not only wholly disproportionate to the amount of actual damage suffered by respondent Scribner, but also bears no reasonable relation to any potential harm to her or potential gain to Hillcrest. It is also clearly excessive in light of the relatively low degree of "reprehensibility" of the defendant's conduct.

In *TXO*, the Court upheld a $10 million punitive damages exaction on the ground that the defendant's conduct had been "malicous and fraudulent" rather than simply negligent; that the conduct was "part of a larger pattern of fraud, trickery and deceit," rather than simply

an isolated incident; and that the defendant's scheme, if successful, *would* have caused harm amounting to several million dollars. 61 U.S.L.W. at 4770-71 (plurality opinion) (emphasis added); *id.* at 4773 (Kennedy, J., concurring in part and concurring in the judgment) (stressing that *TXO* "was not a case of negligence, strict liability, or *respondeat superior*," and that the defendant's conduct was " 'not an isolated incident' " caused by " 'poorly supervised, low level employees' ") (citation omitted).

Under the Court's reasoning in *TXO*, the punitive damages in this case were clearly excessive. Hillcrest was severely punished for the unintentional errors of low level employees on the theory of *respondeat superior*. Those employees were, at most, reckless in failing to identify Scribner, while the hospital itself was, *at most*, negligent for failing to institute additional procedures that would supervise its employees more closely and therefore reduce the risk of an error on their part. Moreover, the misidentification of Scribner was an isolated incident; there was no evidence of even a single other instance of misidentification in the hospital's history.

Furthermore, in marked contrast to *TXO*, the conduct at issue here did not threaten any potential harm greater than the harm actually caused to Scribner. Scribner was mistakenly moved from her bed in preparation for an ultrasound. That movement allegedly caused her sutures to break (even though Scribner was scheduled to be ambulatory that day). There was no allegation, let alone any evidence, that this movement could have caused any

more serious injury to Scribner. The "potential harm" factor of *TXO* is thus completely absent from this case.[6]

Finally, unlike TXO, Hillcrest did not stand to profit from its employees' negligence. This distinction is significant. In *TXO*, the potential gain to the defendant had its fraudulent scheme succeeded was far greater than the actual loss to the plaintiff in defeating that scheme. A large punitive damages award therefore may have been proportionate to the scope of the defendant's conduct and appropriate to deter future misconduct of like sort: because TXO stood to gain several million dollars from its fraudulent scheme, a compensatory award of only $19,000 (for attorneys' fees) could reasonably be thought unlikely to deter the company from engaging in a similar scheme in the future.

Here, however, where the employees' conduct was inadvertent and the hospital obviously did not intend (and could not have expected) to profit from the mishap, the compensatory damages were more than sufficient to cause the hospital to take necessary steps to prevent unacceptable risks of future misidentifications. Certainly punitive damages of $5 million – 50 times greater than

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[6] Notably, Scribner was correctly identified before the ultrasound was performed. The only relevant conduct here, then, is the failure correctly to identify Scribner before she was moved from her bed. In any case, even if the ultrasound had been performed, that procedure – a routine, noninvasive examination – would not have caused any harm. Thus, as Hillcrest points out (Pet. 11 n.10), the conduct in this case was hardly in the same category as performing brain surgery on the wrong patient.

actual damages – are far in excess of any amount necessary to deter future misidentifications or to satisfy society's need for just retribution.

The punitive damages in this case thus do not serve the purposes of deterrence or retribution. In fact, it seems apparent that the amount was based entirely on the hospital's net worth and corporate status. Scribner's counsel repeatedly emphasized Hillcrest's supposed "wealth," making it the centerpiece of his closing argument. Tr. 685-91. That argument was highly prejudicial, urging the jury to impose a large punitive damages award solely because Hillcrest was a large corporation. (Indeed, counsel's argument in this case bore a striking similarity to the closing argument that troubled the Court in *TXO*. Compare Hillcrest Pet. 8-9 with 61 U.S.L.W. at 4780 (O'Connor, J., dissenting)).

Even if consideration of a defendant's worth is not constitutionally proscribed, the Court in *TXO* recognized that undue emphasis on wealth poses a grave risk of prejudice to the defendant. 61 U.S.L.W. at 4771 (plurality opinion); *Id.* at 4779-80 (O'Connor, J., dissenting). Given the utter lack of any other basis for the $5 million punishment in this case, the risk of prejudice was particularly acute.

Finally, the $5 million exaction in this case is not simply unfair to Hillcrest and far in excess of any amount necessary to punish and deter misconduct, but it will adversely affect the ability of Hillcrest (and other health care providers aware of the result in this case) to provide critical health care services in the future. If left in place, the punitive damages will pressure health care providers

to adopt costly and wasteful defensive practices that serve no valid medical purpose and are employed only to avoid enormous tort judgments. If there is any case in which a punitive damages award is unconstitutionally excessive, this is it.

CONCLUSION

For the reasons stated above, Hillcrest's petition for a writ of certiorari should be granted or the case should be remanded for further proceedings in light of *TXO*.

Respectfully submitted,

FREDERICK PAGE DOBSON*
RONALD R. HUDSON
ELIZABETH J. DUNNING
HOLLOWAY, DOBSON, HUDSON & BACHMAN
211 N. Robinson Ave.
Suite 900
Oklahoma City, OK 73102
(405) 235-8593

FREDRIC J. ENTIN
JAMES A. HENDERSON
MARGARET J. HARDY
American Hospital Association
840 N. Lakeshore Dr.
Chicago, IL 60611
(312) 280-6619

Attorneys for Oklahoma Hospital Association

*Counsel of Record

(5)

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OCTOBER TERM, 1992

HILLCREST MEDICAL CENTER, PETITIONER

v.

RONDA SCRIBNER, RESPONDENT

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oklahoma

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REPLY BRIEF FOR THE PETITIONER

W. MICHAEL HILL
EDWARD J. MAIN
Secrest & Hill
7134 South Yale, Suite 900
Tulsa, Oklahoma 74316
(918) 494-5905

REUBEN DAVIS
FREDERIC N. SCHNEIDER, III
WILLIAM C. KELLOUGH
Boone, Smith, Davis, Hurst & Dickman
500 Oneok Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000

ANDREW L. FREY*
KENNETH S. GELLER
MICHAEL A. VATIS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

**Counsel of Record*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. *TXO* CONFIRMS THAT THE $5 MILLION PUNISHMENT IN THIS CASE IS UNCONSTITUTIONALLY EXCESSIVE 2

A. Likely Harm 3

B. Potential Gain 4

C. Reprehensibility of the Conduct 4

D. Pattern of Conduct 6

E. The Hospital's "Wealth" 6

II. THE PROCEDURES IN THIS CASE FAILED TO SATISFY DUE PROCESS REQUIREMENTS 7

A. Jury Instructions 8

B. Judicial Review 9

CONCLUSION 10

TABLE OF AUTHORITIES

Pages

Cases

TXO Prod. Corp. v. Alliance Resources Corp.,
61 U.S.L.W. 4766 (U.S. June 25, 1993) . . . . *passim*

Pacific Mutual Ins. Co. v. Haslip,
499 U.S. 1 (1991) . . . . . *passim*

Miscellaneous

BLACK'S LAW DICTIONARY (6th ed. 1990) 4

Respondent's counsel managed to persuade a jury to impose $10 million in punitive damages on Hillcrest by using inflammatory and misleading arguments. Counsel uses similar tactics in the Brief in Opposition in an effort to convince this Court to deny certiorari, claiming, for instance, that respondent's life was threatened (Br. in Opp. 3), that Hillcrest "condoned and encouraged" reckless identification of patients (*id.* at 16), and that the hospital's conduct was the most reprehensible imaginable (*id.* at 20). Respondent's rhetoric is completely baseless (and, not surprisingly, is notably lacking in record citations). More importantly, that rhetoric serves to illustrate how even a routine negligence case can be so distorted and exaggerated as to induce an enormous punitive damages verdict.

This Court's recent decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, 61 U.S.L.W. 4766 (June 25, 1993) -- decided after the petition was filed -- makes it clear that the punitive damages in this case are constitutionally untenable. Although the Court upheld the punitive judgment in *TXO*, it reiterated that the Due Process Clause provides a substantive safeguard against unreasonably excessive punitive damages and requires meaningful procedural protections to accompany the punitive process. *Id.* at 4769, 4771-72 (plurality opinion); *id.* at 4775-76, 4779-82 (O'Connor, J., dissenting).

It is difficult to imagine a clearer example than this case of what the Court meant in *TXO* and *Pacific Mutual Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), when it confirmed that punitive damages may be so grossly excessive as to violate due process. The punitive damages here bear no reasonable relation to the goals of punishment and deterrence. Moreover, the punishment was imposed without even the minimum procedural protections provided in *TXO* and *Haslip*. If there is any meaning to the Court's pronouncements in *TXO* and *Haslip*, the punitive damages in this case cannot pass constitutional muster.

Respondent's answer to this, which seems to reflect the view of all too many state courts as well, is telling. According to respondent (Br. in Opp. 12), "Unpredictability is the essence of punitive damages." In this context, however, unpredictability equates to irrationality and is not a constitutionally satisfactory justification. This case offers the Court an exceptionally useful vehicle for further defining the boundaries of the constitutional excessiveness inquiry, an undertaking that would be of great value to the lower courts. If, however, the Court is not prepared to address the subject so soon after *TXO*, the decision below should be vacated and remanded for reconsideration in light of the intervening decision in *TXO*. As we now show, it is wholly inconsistent with the opinions of the *TXO* plurality as well as with Justice Kennedy's concurrence and the *TXO* dissent.

I. *TXO* CONFIRMS THAT THE $5 MILLION PUNISHMENT IN THIS CASE IS UNCONSTITUTIONALLY EXCESSIVE

Although it declined to establish any litmus test for determining excessiveness, the plurality in *TXO* upheld the punitive damages there after examining five factors: (1) "'the harm likely to result from the defendant's conduct'" if its fraudulent scheme had succeeded; (2) "the tremendous financial gains that TXO hoped to achieve through its 'elaborate scheme'"; (3) the "bad faith of [the defendant]"; (4) "the fact that the scheme employed in th[at] case was part of a larger pattern of fraud, trickery and deceit"; and (5) "[the defendant's] wealth." 61 U.S.L.W. at 4770-71 (citations omitted; emphasis deleted).

Justice Kennedy, in concurrence, focused on the third and fourth factors. He found that the punitive damages were not unconstitutionally excessive only because TXO *itself* -- "through its senior officers" -- had acted maliciously as "'part of a pattern and practice * * * to defraud and coerce those in positions of unequal bargaining power.'" 61 U.S.L.W. at

4773 (citation omitted). Justice Kennedy emphasized that *TXO* "was not a case of negligence, strict liability, or *respondeat superior*," and that the defendant's conduct was "'not an isolated incident'" caused by "'poorly supervised, low level employees.'" *Ibid.* (citation omitted). See also *ibid.* ("A case involving vicarious liability, negligence, or strict liability might present different issues.").

Every one of the factors that supported the award in *TXO* calls for reversal of the punitive damages here. Indeed, if the $5 million punishment in this case is left standing, *TXO*'s recognition of constitutional excessiveness review would be meaningless.

A. Likely Harm. Critical to the outcome in *TXO* was the enormous harm that the defendant's fraudulent scheme would have caused had it succeeded. Although the plaintiffs' actual injury amounted to only $19,000, the scheme would have resulted in several *million* dollars of harm if it had not been defeated. *Id.* at 4771 (plurality opinion).

In contrast, there was no evidence whatsoever that the conduct here was likely to cause greater harm than that actually suffered by respondent. Taking a patient for an ultrasound is generally about as non-dangerous as a hospital procedure can be.[1] Indeed, the injury that the jury found respondent to have suffered was itself hardly foreseeable, given that she was scheduled to be ambulatory that same day. Reza Dep. 14-15.

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[1] It bears emphasis that the conduct at issue here is misidentifying a patient for an *ultrasound*, not misidentifying a patient for surgery or some other procedure that entails a real risk of harm. There is *no* evidence that the hospital's employees would exhibit the same "lackadaisical attitude" in identifying a patient for a risky procedure. Indeed, as discussed below (at page 6), there was no evidence at trial that *any* sort of misidentification had *ever* occurred at the hospital either before or since the incident here.

Perhaps it is *conceivable* that the movement of respondent could have set off a chain of events resulting in some worse injury than she actually suffered, but such a result was not at all *likely*. Yet, under *TXO*, potential harm can justify a large punitive damages award only if that harm is "'*likely to result* from the defendant's conduct.'" 61 U.S.L.W. at 4770 (plurality opinion) (quoting *Haslip*, 499 U.S. at 21). If possible, but unlikely, harm were sufficient to justify a large award, *any* instance of negligence would support virtually limitless punishment. This is surely not what the Court intended in *TXO*.

B. Potential Gain. In *TXO*, the defendant stood to reap "tremendous financial gains" if its scheme had succeeded. 61 U.S.L.W. at 4771 (plurality opinion). Here, in contrast, Hillcrest obviously did not expect to gain financially from the negligence of its employees. There was thus no need for a huge punitive judgment to deter future misidentifications. The large compensatory award is itself more than sufficient to induce the hospital to take the proper corrective measures.

C. Reprehensibility of the Conduct. In *TXO*, the defendant engaged in a "malicious and fraudulent" scheme to bilk the plaintiff of millions of dollars. 61 U.S.L.W. at 4771 (plurality opinion). See also *id.* at 4773 (Kennedy, J., concurring in part and concurring in the judgment). Here, however, the hospital's employees were at most reckless in misidentifying respondent, while the hospital itself was at most negligent in failing to supervise its employees more closely to ensure that they followed the hospital's established identification procedures.

Respondent tries to bridge this evidentiary gap by repeatedly asserting that the hospital was "reckless." But a person acts recklessly only if he or she is conscious of the risk of harm but knowingly disregards it. See generally BLACK'S LAW DICTIONARY 1270-71 (6th ed. 1990). Here, however, even assuming that the hospital's *employees* were

cognizant of a risk of harm attending their failure properly to identify respondent,[2] there was no evidence that the *hospital* was aware that any of its employees were not following proper identification procedures. Indeed, given the utter absence of prior misidentifications, any such conclusion would wholly lack evidentiary foundation. Although the Oklahoma courts imputed the *employees'* alleged recklessness to the hospital on a theory of *respondeat superior*, there was no finding that the hospital itself was actually aware of the risk of harm.[3]

In any case, whether the hospital was reckless or merely negligent, its conduct stands in sharp contrast to the

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[2] The only conceivable basis for a finding that a hospital employee was "reckless" was respondent's testimony that the orderly persisted in helping her from her bed even after she protested that she had recently had surgery and did not know of any scheduled test. Pet. App. 4a. But even that does not suggest an awareness or disregard of a risk of the kind of harm that the jury found respondent to have suffered. In fact, the orderly testified that he did not perceive any such risk. Tr. 125.

[3] Moreover, respondent acknowledges that Hillcrest had adopted appropriate rules regarding patient identification. See, *e.g.*, Br. in Opp. 4, 7-8. But respondent, like the court of appeals (see Pet. App. 7a), invokes these rules as evidence of the hospital's awareness of the risk of misidentification, suggesting that the promulgation of such rules somehow makes Hillcrest's conduct more worthy of severe punishment.

This is utterly nonsensical. Hillcrest's adoption of reasonable patient identification rules signifies that it understood the risk that misidentification in general could pose, and that it took appropriate precautionary steps. It clearly does not show that Hillcrest was aware that misidentification was likely to occur *despite* the existence of these rules. To prove that, respondent would have had to show that Hillcrest knew that its employees were not following its identification rules. Respondent introduced no such evidence.

malicious, fraudulent scheme of the defendant in *TXO*. This case thus presents precisely the situation that Justice Kennedy took pains to distinguish from *TXO* -- that of an employer found liable on the theory of *respondeat superior* for the actions of "poorly supervised, low level employees" who intended no harm. 61 U.S.L.W. at 4773. Assuming that some modest amount of punitive damages may be beyond constitutional reproof in such a case, surely a $5 million exaction is grossly excessive.

D. Pattern of Conduct. The Court in *TXO* found it significant that the malicious conduct of the defendant was not an isolated incident but "was part of a larger pattern of fraud, trickery and deceit." 61 U.S.L.W. 4771 (plurality opinion). See also *id.* at 4773 (Kennedy, J., concurring in part and concurring in the judgment). In this case, by contrast, the misidentification of respondent was *wholly unprecedented*. Respondent's assertion that misidentifications are "routine" (Br. in Opp. 20), and that the hospital "condoned and encouraged" a "reckless patient identification and location system" is not supported by any evidence in the record or by any finding of any court below. It is simply false.[4]

E. The Hospital's "Wealth." Finally, the plurality in *TXO* found that the punitive damages in that case were not excessive in part because of the defendant's enormous wealth -- between $2.2 and $2.5 *billion*. 61 U.S.L.W. at 4768 n.9. Once again, this case is vastly different. Hillcrest is a *not-for-profit* community hospital. And although its net worth

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[4] Respondent's repeated claims (Br. in Opp. 4, 7) that the orderly and his supervisor were unfamiliar with the hospital's identification procedures both at the time of the incident and at the time of trial are also false. The orderly's entire testimony shows that he was aware of the hospital's identification procedures but did not properly follow them in this case. Tr. 109-145. Moreover, the supervisor specifically stated that the orderly and ultrasound technologist were aware of the correct identification procedures. Tr. 288.

was $110 million, that worth consisted largely of its building, equipment, and other illiquid assets vital to its provision of patient services. Tr. 652. Whatever its net worth, then, Hillcrest is qualitatively different from the huge, profit-making corporation in *TXO*. Instead of merely decreasing "profits," the $5 million punitive judgment will inevitably affect the hospital's ability to provide quality health care at affordable cost.

* * *

In sum, it is impossible to uphold the punitive damages in this case under the factors applied in *TXO*. In addition, it bears reemphasizing that the punitive damages here were 50 times greater than compensatory damages (and more than 1840 times greater than respondent's out-of-pocket losses). Although such a massive disparity between punitive and actual damages may not be dispositive in and of itself, the *TXO* plurality suggested that punitive damages must bear a reasonable relation to *some* objective factor -- whether it is actual damages, potential harm, or something else. 61 U.S.L.W. at 4771. This case involves punishment grossly disproportionate to *any* proper indicator of the gravity of the misconduct or the need for deterrence. At a minimum, then, the courts below should be required to reconsider the enormous punishment here in light of *TXO*.

II. THE PROCEDURES IN THIS CASE FAILED TO SATISFY DUE PROCESS REQUIREMENTS

Respondent contends (Br. in Opp. 17) that Hillcrest received due process simply by being accorded a jury trial and judicial review. This Court's decisions in *TXO* and *Haslip*, however, do not support such a crabbed view of the procedural protections afforded by the Fourteenth Amendment. Those decisions hold that due process requires at least minimal guidance to the jury about how to determine the amount of punitive damages and *meaningful* review of the jury's punishment by the trial court and court of appeals.

Because no such procedural protections were provided here, the imposition of punitive damages violates due process.

A. Jury Instructions. In *TXO*, the Court declined to address whether the instructions on punitive damages provided a sufficient constraint on the jury's discretion, finding that the argument had not been preserved. 61 U.S.L.W. at 4772 (plurality opinion). There is no dispute that Hillcrest preserved its challenge to the jury instructions and that the challenge was considered and rejected by the Oklahoma Court of Appeals. See Pet. 9-10 & n.8. The Court therefore should address the issue in this case.

Two factors in particular are worthy of mention. First, the jury instructions here provided even less guidance on fixing the amount of punitive damages than the instructions in either *Haslip* or *TXO*.[5] In *TXO*, the jury at least was told that it should consider "all of the circumstances surrounding the particular occurrence, including the *nature of the wrongdoing*, the *extent of the harm* inflicted, the *intent* of the party committing the act * * * [and] any *mitigating circumstances* which may operate to reduce the amount of the damages." 61 U.S.L.W. at 4771 n.29 (plurality opinion) (emphases added).

Here, in contrast, the jury was told merely to impose whatever amount it "reasonably believe[d] will punish and be an example to others." Instruction 22; Tr. 683. This instruction left the jury with limitless discretion, since any large award would punish and deter. But the plurality in *TXO* specifically rejected the idea that "*any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable." 61 U.S.L.W. at 4769.

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[5] A comparison of the instruction here with that in *Haslip* is set out at Pet. 18-21.

Moreover, although it did not rule on the question, the Court in *TXO* expressed serious concern that the "emphasis on the wealth of the wrongdoer" at trial "increased the risk that the award may have been influenced by prejudice against large corporations." 61 U.S.L.W. at 4771 (plurality opinion). See also *id.* at 4779-80 (O'Connor, J., dissenting). An even greater risk of prejudice was present here. Respondent's counsel repeatedly stressed the hospital's net worth. Indeed, in a closing argument remarkably similar to the argument that disturbed the Court in *TXO*,[6] counsel urged the jury to impose a severe monetary punishment solely because Hillcrest was a large corporation with substantial net worth.

Although consideration of Hillcrest's net worth by the jury may not have been *per se* unconstitutional, see *TXO*, 61 U.S.L.W. at 4771 (plurality opinion); *id.* at 4779 (O'Connor, J., dissenting), the repeated and misleading emphasis at trial on Hillcrest's "wealth" created a grave risk that the jury severely penalized the hospital on account of its net worth and corporate status rather than as a means of furthering the purposes of retribution and deterrence. This risk was exacerbated by the utter lack of guidance to the jury on how it should consider Hillcrest's net worth or how it should determine what amount of punitive damages was appropriate to punish and deter. The jury instructions therefore completely failed to inform or constrain the jury's discretion.

B. Judicial Review. The Court in *TXO* found that the judicial review of the punitive damages in that case provided a sufficient check on the jury's discretion to satisfy procedural due process. It noted that the trial court had provided an "adequate hearing" on TXO's postverdict challenge to the award. 61 U.S.L.W. at 4772 (plurality opinion). In addition, the appellate court had considered the propriety of

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[6] Compare Pet. 8-9 with 61 U.S.L.W. at 4780 (O'Connor, J., dissenting).

the punitive damages in light of "'(1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future.'" *Id.* at 4768 (citation omitted). See also *id.* at 4772.

This case, in contrast, lacked any meaningful judicial review of the jury's punitive exaction. The trial court does not appear even to have *considered* whether the jury's punishment was unconstitutionally excessive. It merely stated that the evidence was sufficient to submit the issue of punitive damages to the jury in the first place. Pet. App. 22a.

The court of appeals, in turn, simply held that the jury's award of $10 million was "'larger than reason dictates to be necessary to deter such conduct'" and was "'not . . . properly responsive to the legitimate objective of a punitive damage award.'" Pet. App. 20a (citations omitted). It provided no explanation, however, of why a $5 million award was not excessive.

This type of standardless review cannot possibly satisfy due process. If the punitive exaction in this case is left in place, courts will continue to feel free to provide only the most cursory, subjective review of punitive damages -- a situation that does little to serve the constitutional requirement of fair and rational decisionmaking.

CONCLUSION

For the reasons stated above, Hillcrest's petition for a writ of certiorari should be granted and the case heard on the merits. At a minimum, the judgment of the Oklahoma Court of Appeals should be vacated and the case remanded for further consideration in light of *TXO*.

Respectfully submitted.

W. MICHAEL HILL
EDWARD J. MAIN
Secrest & Hill
7134 South Yale, Suite 900
Tulsa, Oklahoma 74316
(918) 494-5905

REUBEN DAVIS
FREDERIC N. SCHNEIDER, III
WILLIAM C. KELLOUGH
Boone, Smith, Davis, Hurst & Dickman
500 Oneok Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103
(918) 587-0000

ANDREW L. FREY*
KENNETH S. GELLER
MICHAEL A. VATIS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

**Counsel of Record*

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